SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 723.

GEORGE MATHESON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE FOURTH DIVISION OF THE TERRITORY OF ALASKA.

INDEX.

	Original.	Print.
Caption	a	1
Præcipe for record	1	1
Indictment	2	2
Arraignment and plea	3½	3
Order appointing jury commissioner, etc.	4	3
Certificate of drawing of jury	6	4
Order to issue venire to jurors	9	6
Affidavit of George Matheson	10	6
Order to subpœna defendant's witnesses at Government expense	12	7
Order beginning trial	13	8
Order continuing trial	13	9
Order continuing trial	14	9
Order continuing trial	15	10
Order concluding trial	16	10
Verdict	16½	11
Transcript of testimony and bill of exceptions	17	11
Examination of juror F. S. McFarline	17	11
W. D. Stewart	21	14
R. M. Crawford	25	16
John Cornell	29	19
Roy McMillan	32	20
John Clifford	38	25
L. F. Protzman	42	27

95087—11——1

Transcript of testimony and bill of exceptions—Continued.	Original.	Print.
Examination of juror A. W. Van Sant	44	28
John Ronan	46	30
H. Chadwick	46	30
H. Merritt	49	32
R. W. Taylor	51	33
A. E. Maltby	55	35
W. H. Browning	57	37
Thos. L. Johnson	58	38
R. S. Boyd	63	41
John Litsey	68	44
J. A. Jesson	69	45
J. M. Brooks	74	48
Carl Thiele	77	49
John A. Webb	79	50
David Finley	82	53
Eugene Johnson	88	56
A. P. Anforsen	90	57
Sam Ashheim	93	60
Thomas Woodson	95	61
E. C. Heacock	97	62
James Lavin	102	65
Alex McEwan	107	68
George Ford	110	70
Max Yagerman	111	71
Eugene Fenton	117	75
Gus Murray	119	76
A. B. Ferguson	121	77
Charles Snipes	123	79
W. W. Perry	126	80
J. A. McFarland	127	81
W. H. Gorham	131	84
L. A. Freestone	133	85
J. R. Stone	136	87
O. E. Tackstrom	140	90
Fred Umphrey	144	92
C. C. Pine	148	95
M. Rosenthal	150	96
A. L. Kievicz	152	98
C. H. McGrew	158	101
John Carlin	161	104
Jury sworn	165	103
Evidence for United States	166	107
Testimony of Joe Lawless	166	107
Fred Owenning	195	126
Robert T. Penrose	205	133
John E. Anderson	225	147
Henry Struck	232	152
Edward Mack	235	154
Wm. D. Taylor	250	165
Ben Norval	258	170
C. V. Lake	267	176
Plaintiff rests	277	182

	Original.	Print.
Transcript of testimony and bill of exceptions—Continued.		
Evidence for defendant	277	182
Testimony of Robert Mattheson	277	182
Mrs. Barbara Mattheson	303	201
Charles B. McDowell	313	208
J. J. Furlong	342	222
J. J. Furlong (recalled)	348	226
Mrs. Rathenberg	353	228
Capt. Edwin Hall	361	234
Capt. Edwin Hall (recalled)	366	237
P. S. Peterson	372	240
Defendant rests	374	242
Evidence for United States in rebuttal	375	242
Testimony of Henry Struck	375	242
Ed Mack	376	243
C. V. Lake	378	244
Ben Norval	382	246
W. D. Taylor	384	247
John Distin	385	248
Government rests	388	250
Instructions to jury	389	250
Instructions requested by defendant	417	268
Defendant's exceptions to charge	430	275
Verdict	435	279
Motion for new trial	436	279
Order overruling motion for new trial	444	284
Judge's certificate to bill of exceptions	445	284
Judgment and sentence	447	285
Assignment of errors	449	286
Petition for transcript free of cost	459	293
Affidavit of poverty	461	294
Opinion	463	295
Order allowing defendant to proceed in forma pauperis	466	296
Petition for writ of error	467	297
Order allowing writ of error	469	298
Writ of error	470	298
Citation and service	472	299
Clerk's certificate	474	300

g In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA
vs.
GEORGE MATHESON.
No. 331. Criminal.

Clerk's transcript of record.

Counsel for the United States, James J. Crossley, United States district attorney, Fairbanks, Alaska; counsel for defendant, John F. Dillon, Fairbanks, Alaska.

1 In the District Court for the Territory of Alaska, Fourth Division.

THE UNITED STATES OF AMERICA, plaintiff,
vs.
GEORGE MATHESON, DEFENDANT.
No. 331. Cr. Præcipe.

To the clerk of said court:

In your record on appeal in the above-entitled cause include the following:

1. Indictment.
2. Order appointing jury commissioner.
3. Certificate of jury drawing.
4. Order to issue venire to grand and trial jurors.
5. Affidavit.
6. Order to subpœna defendant's witnesses at Government expense.
7. Journal entries of trial.
8. Verdict of jury.
9. Bill of exceptions.
10. Judgment and sentence.
11. Assignment of errors.
12. Petition for official transcript free of cost.
13. Affidavit for writ of error in forma pauperis.
14. Opinion overruling former opinion.
15. Order allowing appeal in forma pauperis.
16. Petition for writ of error in forma pauperis.
17. Order allowing writ of error (original).
18. Writ of error (original).
19. Citation (original).
20. Præcipe (original).

JOHN F. DILLON,
Attorney for Defendant.

(Indorsed:) No. 331. Cr. In the District Court, Territory of Alaska, Fourth Division. The United States of America vs. Geo.

Matheson. Praecipe. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 13, 1910. C. C. Page, clerk, by E. A. Henderson, deputy.

2 In the District Court for the Territory of Alaska, Third Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT.
} No. 331. Indictment.

George Matheson is accused by the grand jury of the Territory of Alaska, Third Division, convened at Fairbanks, by this indictment, of the crime of murder in the first degree, committed as follows:

The said George Matheson, on the twenty-fourth day of May, A. D. one thousand nine hundred eight, at Chicken Creek, in the Territory of Alaska, Third Division, and within the jurisdiction of this court, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, killed one Gus Lawless, by then and there shooting him, the said Gus Lawless, with a loaded revolver or pistol, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

Dated at Fairbanks, in the Territory and Division aforesaid, on the twenty-ninth day of December, A. D. one thousand nine hundred eight.

JAMES J. CROSSLEY,
United States District Attorney.

The following are the names of the witnesses examined before said grand jury on the finding of the foregoing indictment: Fred Oenning, Joe Lawless, John Anderson, Henry Struck, Robert T. Penrose.

3 (Endorsed:)

No. 331. Criminal.

THE UNITED STATES OF AMERICA
vs.
GEORGE MATHESON.
} Indictment for the crime of murder in the first degree.

A true bill.

F. H. BRACKETT,
Foreman Grand Jury.

Presented to the court by the foreman of the grand jury in open court, in the presence of the grand jury, and filed in the U. S. District Court, District of Alaska, Third Division.

Dec. 29, 1908.

O. A. WELLS, *Clerk.*
By A. L. MCDONALD, *Deputy.*

3½ In the District Court for the Territory of Alaska, Fourth Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE MATHESON. } Arraignment and plea.

And now, to wit, December 30, 1908, comes H. K. Love, United States marshal for the Territory of Alaska, Third Division, and brings the above-named defendant, George Matheson, into open court. Then also appears John F. Dillon, counsel for defendant, and James J. Crossley, U. S. attorney, counsel for the United States. And the said George Matheson being brought to the bar of the court and there interrogated if the name by which he is named in the indictment found against him be not his true name, says his true name is George Matheson. Thereupon the indictment heretofore found against him is, under the direction of the court, read to the defendant by the deputy clerk of the court, and there is delivered to said defendant a copy of said indictment, with all of the endorsements thereon, including the names of the witnesses appearing before the grand jury for the purposes of this indictment endorsed thereon. Thereupon it being demanded of defendant concerning the premises in said indictment specified, whether he is guilty or is not guilty of the crime of murder in the first degree, as therein accused, defendant for himself orally enters the plea that he is not guilty of the crime charged in the indictment, which plea is thereupon entered upon this journal.

(Endorsements:) Entered in court journal No. 9, page 34.

4 In the District Court for the District of Alaska, Third Division.

In the matter of the general July, 1909, term of court at Fairbanks, Alaska.

Order appointing jury commissioner.

A general term of the District Court, Territory of Alaska, having been called to convene in Fairbanks, Alaska, on Monday, July 5, 1909, at 10 o'clock a. m., for which term a grand and trial jury will be summoned:

Now, therefore, that said juries may be summoned according to law, and having confidence in the honor and integrity of N. A. Shaw, a member of the Democratic Party (being the party in opposition to that party with which the clerk of this court is affiliated), I do now hereby appoint the said N. A. Shaw and commission him to serve as jury commissioner for said term of court.

It is hereby ordered, that the clerk of this court and said jury commissioner shall each prepare not less than 150 cardboard ballots, each

ballot containing the name of a resident of the District of Alaska and a person believed by said clerk and jury commissioner to be a citizen of the United States, each of which ballots shall be separately counted into the jury box in public, after which the box shall be thoroughly shaken, and thereafter the jury commissioner shall draw one name and the clerk alternately one name from said jury box until the two juries are complete. The first twenty-three names drawn from said box shall constitute the grand jury and the following twenty-four names shall constitute the trial jury for said term of court.

Notice of the time and place of said drawing shall be publicly announced, and said drawing shall occur at the hour of
5 10 o'clock a. m. in the court room of the District Court on the 26th day of June, 1909, in the presence of the judge of this court, the U. S. marshal, the U. S. district attorney, and of such members of the bar and of the general public as may wish to attend.

Dated at Fairbanks, Alaska, this 23d day of June, 1909.

THOMAS R. LYONS,
District Judge.

(Endorsed:) Entered in court journal No. 9, page 142.

6 In the District Court for the Territory of Alaska, Third Division.

In the matter of the grand and trial jurors for the July, 1909, general term of court at Fairbanks, Alaska.

Certificate of drawing.

To the Honorable Thomas Lyons, judge of said court:

We, the undersigned, the duly appointed and qualified jury commissioners appointed to select a grand jury and a trial jury to serve during the general July, 1909, term of court to be held at Fairbanks, Alaska, do now, on this 26th day of June, 1909, at the hour of 10 o'clock a. m., beg leave to report that the following-named persons were, as provided by law, duly selected and drawn to serve as grand and trial jurors, to wit:

GRAND JURORS.

Name.	Residence.
1. Chas. Laughlin	Fairbanks.
2. H. A. Weir	Fairbanks.
3. Grant Murdock	Fairbanks.
4. A. B. Culp	Fairbanks.
5. F. O. Barker	Chena.
6. A. J. Griffin	16 above Goldstream.
7. M. V. Nevis	Creek.
8. W. T. Whitely	Fairbasks.
9. Thos. Antonson	Rampart.
10. Martin Nash	Fairbanks.

	Name.	Residence.
11.	J. W. Ralston	Graehl.
12.	E. O. Clark	Fairbanks.
13.	J. H. Caskey	Fairbanks.
14.	Sam Hagan	Engineer Creek.
	15. Al Ouilette	Hot Springs.
7	16. Al B. Rhodes	Cleary.
	17. E. W. Galbraith	Eldorado.
18.	E. Jacoby	Eldorado.
19.	Chas. Strandberg	Esther.
20.	Lewis A. Lee	Deadwood.
21.	C. P. Chesley	Fox.
22.	Louis C. Hansen	Mastodon Creek.
23.	Geo. Wilkinson	Esther.

TRIAL JURORS.

1.	Otto Gall	Chatanika.
2.	Jacob Hepfinger	Fairbanks.
3.	John Ronan	Fairbanks.
4.	John Webb	Graehl.
5.	A. Peters	Rampart.
6.	J. M. Clarke	Hot Springs.
7.	W. E. Evans	Fairbanks.
8.	R. A. Jackson	Fairbanks.
9.	Thos. Quirk	Dome.
10.	H. Merritt	Fairbanks.
11.	W. Melvin	Richardson.
12.	W. E. Griffin	Chena.
13.	L. F. Protzman	Fairbanks.
14.	Jerry Morriarity	Chena.
15.	Ray Southworth	Fairbanks.
16.	A. E. Maltby	Fairbanks.
17.	H. Chadwick	Rampart.
18.	W. H. Browning	Fairbanks.
19.	Sam Callahan	Ft. Gibbon.
20.	R. S. Boyd	Vault.
21.	J. M. Brooks	Fairbanks.
22.	Frank Hines	Mastadon Creek.
23.	F. B. Fountain	Dome.
24.	Karl Thiele	Fairbanks.

8 Dated at Fairbanks, Alaska, this 26th day of June 1909.

E. H. MACK,
Clerk of said Court, and ex officio Jury Commissioner.

N. A. SHAW,
Jury Commissioner.

Witnesses to drawing of jurors:
HENRY RODEN.
J. K. BROWN.

Endorsed: Entered in the court journal No. 9, page 146–5.

9 In the District Court for the Territory of Alaska, Third Division.

In the matter of the drawing of grand and trial juries for the general July, 1909, term of court at Fairbanks.

Order to issue venire to grand and trial jurors.

And now, to wit, on this 26th day of June, A. D. one thousand nine hundred and nine, it appearing from the certificate and report of the jury commissioner heretofore duly appointed by this court, and the clerk thereof, duly filed and now presented to the judge presiding over the above-entitled court, that they have drawn, in the manner provided by law, the names of twenty-three persons to serve as grand jurors and the names of twenty-four persons to serve as trial jurors at a general July, 1909, term of said court, to be held at Fairbanks, Alaska, beginning on the 5th day of July, A. D. one thousand nine hundred and nine, at 10 o'clock a. m. of said date.

Ordered, that said report be, and the same is hereby, approved, and the clerk is directed to spread said certificates and report and this order upon the journal of this court. And the clerk of this court is further directed to issue to the U. S. marshal of said Territory a regular venire for the summoning of the persons whose names were so drawn as grand jurors to be and appear before this court at 10 o'clock a. m. on Monday, the 12th day of July, 1909, and the persons so drawn as trial jurors to be and appear before this court on Monday, the 26th day of July, A. D. 1909, at 10 o'clock a. m. of said day. .

THOMAS R. LYONS,
District Judge.

(Endorsed:) Entered in court journal No. 9, page 146.

10 In the District Court for the Territory of Alaska, Third Division.

THE UNITED STATES OF AMERICA, PL., *vs.* GEORGE MATHESON, DEF. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Alaska, ss:

GEORGE MATHESON, being first duly sworn, on oath says:

That he is the defendant in the above-entitled case. That he has been indicted in the above-entitled court upon a charge of murder in the first degree and the time of his trial thereon set for the 4th day of August, 1909. That the following are material witnesses to his defence at said trial, and that he cannot safely go to trial without them, to wit: Albert Fortier, W. H. McPhee, Al. Morantze, P. S.

Peterson, E. D. Hall, Louis Golden, Robert Matheson, Mrs. Robert Matheson, George Carey, Mrs. Rathberg, Mrs. Cranson, all of whom live within the district where the said action is to be tried; that he expects to prove by said witnesses that he was at the time of the commission of the act charged to be murder in said indictment he was insane to such degree that he was not responsible for his act; also Dudley McKinney, Scott Holbrook, J. W. Forceland, and R. Penrose, who are now residents of the district where said cause is to be tried, and by whom he expects to prove that he was so beaten and abused be the deceased, whom he is in said indictment charged with murdering, that he was justified in the killing and that he was legally excused therefor; that each of said witnesses are now within the district in which this court is held; that he is not possessed of sufficient means, or of any means, and cannot procure any means, and is actually unable to pay the fees of such witnesses or the fees and
11 expences for having them subpœn'ed.

Wherefore he prays the court, that an order be made herein that the said witnesses be subpœn'ed, as provided in section 878, Revised Statutes of the United States.

GEORGE MATHESON.

Subscribed and sworn to before me this 10th day of July, 1909.

[SEAL.] JOHN F. DILLON.
Notary Public in and for the Territory of Alaska, residing at Fairbanks, Alaska.

Due and legal service hereof accepted this 10th day of July, 1909.

JAMES J. CROSSLEY, *U. S. Attorney,*
By CECIL H. CLEGG, *Asst.*

(Endorsed:) In the District Court for the Territory of Alaska, Third Division. The United States of America, pl., vs. George Matheson, def. Affidavit in forma pauperis. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 10, 1909. E. H. Mack, clerk, by E. A. Henderson, deputy.

12 In the District Court for the Territory of Alaska, Fourth Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE MATHESON. } No. 331. Cr.

Order to subpœna defendant's witnesses at Government expense.

This cause coming on to heard on the application and affidavit of the defendant to have certain witnesses for his defense subpœnaed and required to attend at the trial of this cause at the expense of the

United States, the plaintiff appearing by James J. Crossley, Esq., United States attorney, and the defendant appearing by his attorney, John F. Dillon, Esq.; and the court having read said application and affidavit and considered the same, and being fully advised in the premises, finds that said application should be granted:

Therefore it is ordered that the following-named witnesses be subpœnaed on behalf of the defendant to attend the trial of this cause, at the expense of the United States, to wit: Albert Fortier, Al. Morantxe, J. C. Berry, Peterson, Capt. E. D. Hall, Louis Golden, George Carey, Billie Forsland, Jim Furlong, Mrs. Rathenberg, Mrs. Gransen, Charles McDowell, Scott Holbrook, and R. T. Penrose; and that the expense and costs incurred by the process and the fees of such witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpœnaed in behalf of the United States.

THOMAS R. LYONS,
District Judge.

(Endorsed:) Entered in court journal No. 9, page 198. Tuesday, July 13, 1909.

13 In the District Court for the Territory of Alaska, Fourth Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE MATHESON. } No. 331. Cr.

Trial.

Now on this 8th day of September. 1909, the above-entitled cause being called for trial and the jury having been completed and sworn and the defendant, George Matheson, and his counsel, and the counsel for the United States being present in open court, and announcing themselves ready for trial, it is ordered that the trial be proceeded with.

James J. Crossley, U. S. district attorney, counsel for the United States, made the opening address to the jury and outlined the evidence the Government expected to produce.

John F. Dillon, counsel for defendant, made an address to the jury and outlined the theory of the defense and the evidence he expected to introduce.

Thereupon the prosecution called its witnesses, and Joseph Lawless, Fred Oenning, Robert T. Penrose, and John E. Anderson were sworn and testified until the hour for recess had arrived, when the jury was admonished and instructed and placed in the custody of the bailiffs heretofore sworn. (Journal No. 9, page 360.)

THE UNITED STATES OF AMERICA
vs.
GEORGE MATHESON. | No. 331. Cr.

Continuation of trial.

Now on this 9th day of September, 1909, the above-entitled cause came on for a continuation of the trial, then being present
14 in open court the defendant, George Matheson, and his counsel, John F. Dillon, and James J. Crossley, U. S. district attorney, counsel for the United States. The jury heretofore empaneled and sworn to try this cause appeared in the jury box and each member thereof answered to his name as the roll was called. Counsel for the prosecution continued to produce his witnesses, and Henry Struck, E. L. Mack, Wm. D. Taylor, Ben Nowell, and C. V. Lake were sworn and testified. The prosecution rests.

Defendant, through his counsel, moved that the jury be instructed to bring in a verdict of "Not guilty," which motion was by the court overruled. To which ruling defendant excepts, and the exception is allowed.

Thereupon defendant produced his witnesses, and Robert Matheson, Mrs. Robert Matheson, Chas. B. McDowell, and James J. Furlong were sworn and testified until the hour for recess had arrived, when the jury was again admonished and instructed and allowed to retire in coustody of the bailiffs theretofore sworn. (Journal No. 9, page 363.)

THE UNITED STATES OF AMERICA
vs.
GEORGE MATHESON. | No. 331. Cr.

Continuation of trial.

Now on this 10th day of September, 1909, the above-entitled cause came on for a continuation of the trial, then being present in open court defendant, George Matheson, and his counsel, John F. Dillon, and James J. Crossley, United States district attorney, counsel for the United States. The jury heretfore empaneled and sworn to try this cause appeared in the jury box and each member answered to his name as the roll was called. Counsel for the
15 defense continued to introduce his evidence, and Mrs. O. Rothenberg, Edwin Hall, and P. S. Peterson were sworn and testified for the defendant. The defense rests.

Henry Struck, Ed. Mack, C. V. Lake, Ben Norvall, W. D. Taylor, and John Diston were called by the prosecution and testified in rebuttal. Both sides rest.

The hour for recess having arrived the court thereupon admonished the jury, which thereupon retired in custody of two bailiffs heretofore sworn and instructed as by law required. (Court journal No. 9, page 366.)

UNITED STATES OF AMERICA
vs.
GEORGE MATHESON. } No. 331.

Continuation of trial.

Now on this 11th day of September, 1909, the above-entitled cause came on for a continuation of the trial, then being present in open court the defendant, George Matheson, and his counsel, John F. Dillon, and James J. Crossley, United States district attorney, counsel for the United States. The jury heretofore sworn to try the cause appeared in the jury box and each member thereof answered to his name as the roll was called.

Cecil H. Clegg, assistant United States district attorney, made the opening address to the jury on behalf of the prosecution, and was followed by John F. Dillon, who addressed the jury on behalf of the defendant. James J. Crossley, United States district attorney, made the closing address on behalf of the prosecution.

The court thereupon read his instructions to the jury and handed a typewritten copy of the same to a member of the jury
16 together with six forms of verdict, after which the jury immediately retired to deliverate upon the verdict, in charge of court bailiffs, Frank Blanchfield and G. A. Barton, who were first sworn and instructed as provided by section 192 of the civil code. (Court journal No. 9, page 367.)

THE UNITED STATES OF AMERICA
vs.
GEORGE MATHESON. } No. 331. Cr.

Verdict of jury.

Now on this 11th day of September, 1909, at 9.30 o'clock p. m., comes into open court the jury heretofore empannelled and sworn to try the above-entitled cause. Then was present in open court the defendant, George Matheson, and his counsel, John F. Dillon, and James J. Crossley, United States district attorney, counsel for the United States. The roll being called and each juror answering to his name, it was demanded of the jurymen if they have agreed upon a verdict. The foreman of the jury answering in the affirmative, it is thereupon demanded that the jury render its verdict, which being such as the court could receive, was by the court received and accepted by the court and read and filed by the clerk in open court. The defendant demanding that the jury be polled, the roll was called and each member of the jury separately and for himself announced the verdict as rendered was his own individual verdict. The verdict so rendered, accepted, separately acknowledged, read and filed in open court was in words and figures as follows, to wit:

16½ In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA
v.
GEORGE MATHESON, DEFENDANT. } No. 331. Criminal.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled case, find the defendant George Matheson guilty of murder in the first degree as charged in the indictment, but "without capital punishment."

Fairbanks, Alaska, September 11th, 1909.

(Signed) J. A. JESSON, *Foreman.*

(Endorsements:) Entered in court journal No. 9, page 368.

17 In the District Court for the Territory of Alaska, Fourth Judicial Division.

UNITED STATES OF AMERICA
v.
GEORGE MATHESON, DEFENDANT. } No. 331. Criminal.

Transcript of testimony.

Appearances: John F. Dillon, esq., for the defendant; James J. Crossley, district attorney, and Cecil H. Clegg, assistant dist. attorney, for the U. S.

Be it remembered that on the 7th day of September, 1909, the above-entitled cause came on regularly for trial before the above-entitled court and a jury, the defendant appearing in person and by his counsel, John F. Dillon, esq., and the United States appearing by James J. Crossley, U. S. district attorney, and Cecil H. Clegg, assistant district attorney, and the court having inquired if the parties, respectively, were ready for trial in said cause, and they both by their counsel having announced they were ready for trial, thereupon the following proceedings were had:

F. S. MCFARLINE being called as a juror and first duly sworn to answer truly upon his voir dire testified as follows:

Direct examination by Mr. DILLON:

Now before examining this juror, if the court please, for the purpose of preserving the record the defendant objects to the selection of a jury from the present panel for the reason that at the time it was called the judge who issued the call for the jury was without jurisdiction to issue such call; that at the time such jury was called

the Fourth Judicial Division of Alaska had no existence,
18 that at the time such call was made there was no authority for the calling of a jury for the Fourth Judicial Division of Alaska, and such jury has no legal authority to try this cause.

By the COURT. The objection is overruled. (Exception.)

MR. DILLON. You reside in Fairbanks, Mr. McFarline?

A. I do.

Q. Are you married or single?

A. Single.

Q. How long have you resided here?

A. Since 1905.

Q. Where did you reside before coming here?

A. Dawson.

Q. How long were you there?

A. From the spring of 1898 on.

Q. Were you ever in the Fortymile country?

A. Only in passing through there.

Q. Did you ever live there, I mean?

A. No, sir.

Q. Do you know what this case is?

A. No, sir.

Q. This is the case of the United States against George Matheson, charged with the murder of a man by the name of Lawless at Chicken Creek about a year ago.

A. No; I know nothing about it.

Q. Have you ever read an account of the case?

A. I presume I have if it was published.

Q. Are you acquainted with Mr. Matheson, the father of the defendant in this case?

A. No, sir.

Q. Do you know anything at all about the facts of the case?

A. I do not.

19 Q. You haven't talked with anybody about the case?

A. No, sir.

Q. Have you any prejudice against the defence of insanity in a case of this kind?

A. No; I don't know as I have.

Q. Do you think you can give it the same consideration as any other defence—say self-defence—where it is interposed as a defence?

A. I think I could.

Q. Well, do you feel sure that you could?

A. Yes.

Q. If there were evidence of insanity introduced, yet not sufficient to entirely convince you, but left a reasonable doubt in your mind as to the sanity of the defendant in committing the act charged, would you give the defendant the benefit of that doubt if the court should instruct you that that is the law?

A. I would.

Cross-examination by Mr. CROSSLEY:

You have lived in Fairbanks some time?

A. I have.

Q. Has Mr. Dillon ever been your attorney in any matter?

A. Never.

Q. Has any one ever talked to you about this case?

A. Not in particular; I might have talked about it, but nothing in particular that I remember of.

Q. Have you talked with any one who claimed to know the facts of the case?

A. No, sir.

Q. From what has been said about the case and from what you have read has any opinion or impression been formed in your mind as to the guilt or innocence of the defendant?

A. There is not.

Q. So you could enter upon the trial of the case without any prejudice for or against the Government or the defendant?

A. Yes, sir; I could.

Q. And you could listen to the evidence and the instructions of the court and return your verdict on them alone?

A. I could.

Q. Mr. Dillon asked you something about the defence of insanity in a case of this kind. Your verdict on that matter would be entirely in accordance with whatever instructions might give on that matter would it not?

A. It would.

Q. That is, you would take your instructions from the court as to what your verdict should be and the evidence that is necessary to support a verdict on that defence?

A. I would.

Q. Mr. McFarline, this is a case wherein the defendant is charged with murder in the first degree in which the penalty might be death, and with that understanding of the case would you have such conscientious opinions about the death penalty as would preclude you from finding the defendant guilty if the evidence and the law given to you by the court warrant it? In other words, have you conscientious scruples against the infliction of the death penalty?

A. I have in a way—I wouldn't like to——

Q. How is that?

A. I have in a way, yes; I should hate to.

Q. You would hate to bring in a verdict of that kind?

A. I would.

Q. But if the evidence under the instructions of the court warranted it, would you do so if you are selected as a juror in this case?

A. I would.

Q. Even though you might hate to do so, in conformity with the law, if the evidence were sufficient under the instructions of the court, you would not hesitate to bring in such a verdict?

A. I suppose I would have to.
Q. The question is, would you?
A. I would.
Q. Have you sat as a juror where such an offence was charged heretofore, Mr. McFarline?
A. No; I never have.
That is all—we accept the juror.
The COURT. I suppose, Mr. Dillon, you are aware of the rule of court with reference to peremptory challenges?
Mr. DILLON. O yes.

W. D. STEWART, called as a juror and first duly sworn to truly answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

The rule for peremptories, as I understand it, is that the defendant must exercise his right to a peremptory before the juror is turned over to the State for examination?
The COURT. Yes, sir.
Mr. DILLON. You know what this case is about Mr. Stewart?
A. Yes, sir.
Q. Are you acquainted with the defendant—this boy sitting here by his father?
22 A. No, sir.
Q. Have you ever read the particulars of the case?
A. I think I did read something, but I don't remember now what it was.
Q. Do you know whether you have ever talked with anybody about it?
A. I may have.
Q. Have you any opinion as to the guilt or innocence of the defendant or as to the merits of the case?
A. No, sir.
Q. How long have you lived in Alaska?
A. I have been in Fairbanks four years.
Q. Have you ever sat on a criminal jury before?
A. Yes, sir.
Q. Have you sat on a jury where a case of this kind was tried?
A. No, sir.
Q. How long since you have acted as a trial juror on a criminal case.
A. Last week.
Q. What case?
A. I was on the Pierce jury for one, and the Vachon case.
Q. How old a man are you, Mr. Stewart?
A. Forty-five.
Q. Are you married or single?
A. Single.

Q. In a case of this kind, where one of the defences introduced is insanity of the defendant at the time of the commission of the act, if such a defence were introduced have you any prejudicy against such defence?

A. No, sir.

Q. Do you think you could accept such a defence and give it the same consideration and weight as any other defence?

A. I think so.

23 Q. Do you feel sure that you could?

A. I think I could.

Q. Would you require any more evidence to establish the fact of insanity than any other defence—for instance, self-defence?

A. Yes, I believe it would.

Q. You believe it would?

A. Yes, sir.

(Defendant challenges the juror for cause.)

Mr. CROSSLEY. We resist the challenge on the ground that a man is presumed to be sane and not insane.

Cross-examination:

You say you think it would take some more evidence?

A. Yes, I think it would.

Q. But relative to any evidence that might be introduced as a defence supporting the claim that the defendant was insane, you would comply with whatever instructions the court might give on that subject, would you?

A. Yes, sir.

Q. And you think you could be a just, fair, and impartial juror in the case?

A. Well, I would try to be.

Q. The question is, would you be?

A. Yes, I guess I would.

The COURT. Now, Mr. Stewart, if the defence of insanity should be interposed, and the evidence concerning that matter should raise a reasonable doubt in your mind as to the guilt of the defendant, under the instructions of the court could you resolve that doubt in his favor and acquit him?

A. Yes, I believe I could.

Q. You have no such prejudice against that defence as would

24 prevent you from giving the defendant a fair and impartial?

A. No, sir.

The COURT. I think the juror is qualified.

Mr. DILLON. If the court please, the juror has said this—I have known Mr. Stewart a long time, and know him to be a conscientious man—but he has said it would take more and stronger evidence to convince him of the insanity of the defendant than it would any other defence, so we start in handicapped right there. As a matter of fact, it ought to require no more evidence or stronger evidence to establish the fact of insanity than any other defence.

The COURT. Well, it is oftentimes difficult, Mr. Dillon, for a juror to estimate the strength or character of evidence that will raise a reasonable doubt in his mind. But as long as a man says, regardless of what the defence is, that if there is a reasonable doubt raised he will resolve that doubt in favor of the defendant and acquit him, I think that is sufficient. It depends a good deal on what you mean by "more evidence."

Have you any such prejudice, Mr. Stewart, against the defence of insanity as would preclude you from giving the defendant a fair trial?

A. No, sir.

Q. Have you any such prejudice against the defence of insanity as would preclude you from giving the benefit of any reasonable doubt in favor of the innocence of the defendant?

A. No, sir.

The COURT. The challenge is overruled. Exception.

(Juror Stewart challenged peremptorily by defendant.) (1)

25 R. M. CRAWFORD, called as a juror and first duly sworn to answer truly on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Your name is R. M. Crawford?

A. Yes, sir.

Q. You are engaged in the real estate business here in town, are you not?

A. Yes, sir.

Q. How old are you, Mr. Crawford?

A. Forty-eight.

Q. You are married of course?

A. Yes, sir.

Q. How long have you been in this part of the country?

A. I have been in Fairbanks since 1904.

Q. Are you acquainted with the Mathesons, of Chicken Creek?

A. I am acquainted with the father.

Q. How long have you known him?

A. Just since he came here.

Q. You are not acquainted with the defendant?

A. No, sir.

Q. You understand what the charge against the defendant is?

A. Yes, sir.

Q. Have you read or discussed this charge against the defendant?

A. I read it in the papers at the time it occurred.

Q. Did that cause you to form or express an opinion as to his guilt or innocence?

A. No.

Q. Have you any such opinion now?

A. No, I have not.

Q. You feel that you can fairly and impartially try the defendant and render a verdict according to the law and
26 the evidence?

A. I do.

Q. Do you think what you have read or heard about the case would interfere in any way with that?

A. I don't think so.

Q. You feel sure of it?

A. Yes, sir.

Q. Have you any prejudicy against the plea of insanity when interposed as a defence to murder?

A. No; I haven't any prejudice against it.

Q. Would you give that defence the same consideration you would to any other defence?

A. I would endeavor to do so.

Q. Well, would you feel that you could give it the same fair consideration and weigh the evidence for and against it as it might be interposed, or is there some prejudice in your mind against that sort of a defence?

A. Well, I can't say but what there is some feeling that——

Q. That it is rather an unnecessary defence sometimes?

A. Yes, sir.

Q. That is, that it is a defence that has been abused sometimes?

A. I do; yes, sir.

Q. And for that reason you have a prejudice against it?

A. Well, not if I feel that an honest defence of insanity—if it is an honest defence, that is all I would require.

Q. Would it take any more evidence in a defence of that kind than any other defence—stronger evidence on that fact?

A. I don't believe I can answer that question; I don't know whether it would or not.

Q. Still, you feel some prejudice against it as a defence?

A. Well, I feel that the defence has been used a great many times when it was not justified by the facts.

27 (Defendant challenges the juror for cause.)

The COURT. Does the Government resist?

Mr. CROSSLEY. Yes, sir; most assuredly.

The COURT. I don't think a juror is disqualified simply because he says he thinks a certain defence has been overdone. He doesn't say he wouldn't give it due consideration. Many men might feel that the defence of insanity or self-defence had been used many times when it was no interposed in good faith.

Now, Mr. Crawford, assuming that the defence of insanity is interposed in good faith, and it should so appear to you, could you give that sort of a defence the same consideration you could to any other defence interposed?

A. I could; yes, sir.

Q. And if it raised a reasonable doubt in your mind, under the instructions of the court, as to the guilt of the defendant, you could resolve that doubt in his favor the same as in any other defence?

A. Yes; I could.

Mr. DILLON. If there was a reasonable doubt raised by the evidence offered as to whether or not the defendant was insane at the time of the commission of the offence to the extent that the court might instruct you that it would amount to an excuse from the result of his act—I say if there was a reasonable doubt as to whether he were insane to that extent, would you give him the benefit of that doubt and acquit him?

A. I would.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

28 You would consider fairly whatever evidence was submitted and render your verdict upon that evidence and the instructions of the court?

A. Yes, sir.

Q. Has Mr. Dillon been your attorney in any matters?

A. He may have, a long time ago—no; I guess he hasn't.

Q. Nothing but what has been entirely closed up—if there ever was anything.

A. Yes, sir.

Q. You say you have known, to some extent, Mr. Matheson, the father of the defendant; has he talked to you about this case?

A. No; I only have a speaking acquaintance with him.

Q. Has anyone talked anything to you about the case who claimed to know the facts?

A. If they have I have forgotten all about it.

Q. Did you formerly live at Circle or Eagle?

A. No; I formerly lived at Dawson.

Q. Have you ever been down in the Chicken Creek country?

A. I just passed through the Fortymile.

Q. Well, has anything that you read or heard about the case caused you to form an opinion or impression as to the guilt or innocence of the defendant?

A. I don't believe there has. I read the case through the papers at the time of its occurrence, but I don't believe I have any opinion at all as to the guilt or innocence of the defendant.

Q. If you have such, or have had such, you would entirely disregard it and try the case fairly and impartially on the evidence and the instructions of the court?

A. Yes, sir.

Q. And would you do that?

A. Yes, sir.

29 Q. This is a case wherein the defendant is charged with murder in the first degree, wherein the punishment if the defendant is found guilty might be death. Have you such

conscientious opinions as would preclude you from returning a verdict of guilty in such a case if the evidence under the instructions of the court would warrant it?

A. No; I have not.

Q. That is, you have no conscientious opinions or scruples against the infliction of the death penalty where the evidence and the instructions of the court would warrant it.

A. No; I have not.

(Juror accepted.) (2)

JOHN CORNELL, a juror called and first duly sworn to answer truly upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Your name is John Cornell?

A. Yes, sir.

Q. How old are you, Mr. Cornell?

A. Fifty-four.

Q. How long have you resided in Alaska?

A. Between twenty-three and twenty-four years.

Q. How long have you been in the interior?

A. I have been in the interior since 1903.

Q. Have you ever been at Chicken Creek?

A. No, sir; never.

Q. Or the Fortymile district?

A. No, sir.

Q. You know what this case is about?

A. I heard it here in court; yes, sir.

Q. Have you ever talked with anybody about it?

A. No, sir.

Q. Have you ever read anything about it?

A. No, sir.

Q. Are you acquainted with Mr. Matheson, the father of the accused?

A. No, sir.

Q. You're not acquainted with the accused, either?

A. No, sir.

Q. What is your occupation?

A. Prospecting and mining.

Q. Where did you live before coming to the interior of Alaska?

A. I lived in—Douglas is the last place; I lived up the Alaska coast for a couple of years.

Q. How long did you live at Douglas?

A. Well, I have been there several times; the last time I think I was there about three years.

Q. When was that?

A. Just before I came in here.

Q. Have you ever sat on a murder case before?

A. Yes, sir.

Q. You were one of the jurors in the case of the United States against Homer Bird, were you not?

A. Yes, sir.

Q. Have you any prejudicy against the defence of insanity where it is interposed in a case of this kind?

A. Well, no, sir.

Q. You don't think you have?

A. No, sir.

Q. Do you feel you could give it the same consideration you do any other defence and view it with just as much leniency or countenance?

A. Yes, sir; I could.

31 Q. You think that you feel sure that it would make no difference if there were evidence of insanity of the defendant at the time of the commission of the act; that you would consider that the same as any other defence?

A. Yes, sir.

Q. Would it take any greater or stronger evidence to convince you of insanity as a defence than any other defence?

A. Well, no, sir; I don't think it would.

Q. If there were evidence of insanity of the defendant at the time of the commission of the act, and that evidence were not so strong as to convince you beyond all reasonable doubt whether or not the defendant was insane at the time of the commission of the act, would you give him the benefit of that doubt and bring in such a verdict under the law as the court will instruct you—in case there is reasonable doubt?

A. Yes, sir.

Q. You feel that you could do that fully, do you?

A. Yes, sir.

Q. Do you know of any reason why you couldn't sit in this case and bring in a fair and impartial verdict according to the law and the evidence?

A. No, sir; I do not.

Q. You say you were a juror in the Bird case?

A. Yes, sir.

Q. Have you been a juror in any other case where murder was charged?

A. Yes, sir.

Q. What case was that?

A. The Dunn case.

Q. Those are the only ones?

A. Yes, sir; they are.

(Defendant challenges peremptorily.) (2)

32 ROY MCMILLAN, juror, called and first duly sworn to answer truly upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside?

A. Fairbanks.
Q. What is your occupation?
A. Mining.
Q. How long have you been mining?
A. Well, since 1905.
Q. What did you do before that?
A. Well, I was in the upper country (Yukon Territory).
Q. Mining there?
A. Yes.
Q. Where were you born?
A. In Tacoma, Washington.
Q. Your father was killed, was he not?
A. Yes, sir.
Q. Would that fact, do you think, have any effect on your sitting on a jury in a case of this kind?
A. Yes, sir; I think it would.
Q. You think you couldn't eradicate that from your mind and try a man as fairly and impartially as if it hadn't occurred?
A. I hardly think I could.
(Juror challenged for cause. No resistance. Excused.)

L. T. LEWIS, juror, called and first duly sworn to answer truly upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You reside in Fairbanks, do you, Mr. Lewis?
33 A. Yes, sir.
Q. How long have you lived here?
A. Since 1904.
Q. Are you married or single?
A. I am a married man.
Q. Does your family live here?
A. No, sir; I have one son here.
Q. How old is your son?
A. He is thirty-three years old.
Q. What is your occupation?
A. At the present time I am not doing anything; my real occupation is book-keeper and assayer.
Q. How long have you lived in Fairbanks?
A. About five years.
Q. Are you acquainted with the defendant George Matheson or his father?
A. No, sir; I am not.
Q. Do you know what this case is?
A. I heard it mentioned here this morning; simply know the name of the case.
Q. Have you ever talked or read about the matter?
A. I think I may have read about it at the time.
Q. Do you read the Evening News?
A. Yes, sir; sometimes.

Q. Did you read it day before yesterday?
A. No, sir.
Q. Or yesterday?
A. No, sir.
Q. Does the relation of attorney or client exist between you and Mr. Clegg, the assistant prosecuting attorney?
A. No, sir.
Q. Has it ever existed?
A. No, sir.
34 Q. You say you didn't talk with anyone about this case?
A. No. sir.
Q. Where did you come from to Alaska?
A. San Francisco.
Q. How long did you live there?
A. Ten years, the last time.
Q. Where were you born?
A. I was born in Missouri.
Q. Did you live there until you grew to manhood?
A. No, sir; I was a year and a half old when I arrived in California.
Q. Have you any prejudicy against the defence of insanity where it is interposed in a case of this kind?
A. I can't say that I have any prejudice, but I should want to be convinced that a man was insane at the time he committed a murder before I could acquit him.
Q. Would it take any more evidence to convince you of that fact than any other?
A. I can't say that it would.
Q. You think you could give the evidence in respect to that fact the same fair consideration as any other?
A. I could.
Q. Would you consider circumstantial evidence in a case of that kind the same as in any other case?
A. I would give it the same weight; yes, sir.
Q. You would give it just as much weight and credit?
A. Yes, sir.
Q. And if there was evidence of insanity introduced such as would raise in your mind a reasonable doubt as to the sanity or insanity of the defendant at the time the act was committed, would you give him the benefit of the doubt?
A. Well, I would; but I don't know. It would be pretty
35 hard for me to decide what would be a reasonable doubt in a case of that kind.
Q. Well, if you couldn't say whether or not he was sane or insane to your own satisfaction?
A. Well, isn't a reasonable doubt something more than that?
Q. I am not prepared to answer that question and am not permitted to answer it. Well, now, then, here—if you couldn't say in your own mind—couldn't arrive at a conclusion or satisfy yourself

whether or not the defendant was sane or insane, would you give him the benefit of the doubt?

A. Well, I couldn't decide that now one way or the other. Of course the law presumes a man to be innocent of a crime until he is convicted, and I should have to leave him in that state if I couldn't decide it. In a case where a man has committed murder, we will say, he is presumed to be innocent until proven guilty, and if I didn't have sufficient evidence to prove he was guilty I should have to leave the case in the state I found it in.

Q. But where the defence of insanity is interposed. Now, then, you understand, a man who is insane, or so insane or to that extent that he may be excused for his act or relieved from the penalty that would follow it, that that excuses him. Now, then, the court will instruct you as to the degree of insanity that will excuse the defendant. Now, if the evidence were such that you couldn't make up your mind fully to your own satisfaction, or that you had some reasonable doubt whether or not the defendant was insane to that degree, would you give him the benefit of that doubt rather than the prosecution? Would you give him the benefit of the doubt and bring in a verdict accordingly?

A. I think I answered that question. I said I would leave
36 it in the state I found it, because if a man is presumed to be innocent——

Q. Well, just answer the question yes or no.

A. Well, a man is presumed to be innocent; it takes testimony to prove his guilt; and if in my mind that testimony hasn't been introduced I would have to leave him where I found him—that is, innocent.

Q. What was the last part of that answer?

A. I said if I left him where I found him, I would leave him innocent.

Q. But that doesn't satisfy this question; you can answer this yes or no. Would you give him the benefit of the doubt if you had a reasonable doubt as to his sanity or insanity?

A. Well, I should have to be governed in making up my opinion in that by the instructions of the court. I can't say what I would do until the case comes before me.

(Defendant challenges for cause. The Government resists.)

By the COURT:

Mr. Lewis, if the evidence under the instructions of the court should raise a reasonable doubt in your mind as to the sanity of the defendant, and therefore—and therefore as to his responsibility for his acts, would you resolve that doubt in his favor and acquit him—could you and would you?

A. O, I certainly could and would. It is like this: I would have to be certain a man was guilty of anything before I should say so. This case happens to be a little bit different than any I have had before.

Q. But counsel puts this question to you: Assuming that the defence of insanity will be interposed in this case, and assuming
37 that the proof in support of that defence should raise a reasonable doubt in your mind as to his sanity—that is, as to the responsibility of the defendant, could you, under the instructions of the court—could you and would you resolve that doubt in favor of the defendant and acquit him?

A. Yes, sir; I suppose I would in that case. I explained that, I thought. I would consider that the same as I would in the commission of a crime where some other defence was set up—that is, if I had a reasonable doubt of a man's guilt I would give him the benefit of it.

Q. No matter from what it arose, from the evidence in the case or from a want of evidence, as long as you had a reasonable doubt as to the guilt of the defendant you would resolve that doubt in his favor and acquit him?

A. Yes, sir.

Q. No matter whether it arose out of the proof as to insanity or any other defence, if a reasonable doubt were raised in your mind you would resolve that doubt in his favor and acquit him?

A. Yes, sir.

The COURT. The juror is competent, I think.

Mr. DILLON. I would like to ask some further questions.

The COURT. Very well.

Mr. DILLON. Suppose it was admitted the defendant killed a man, and the only defence is insanity. Now, there has been evidence enough introduced, we will suppose, to raise a doubt in your mind as to whether or not he was insane at the time of the killing. Would you give him the benefit of that doubt?

A. Well, I would have to; but I wouldn't like to be placed in such a position.

Q. That isn't the question; the question is would you give
38 him the benefit of that doubt?

A. As I stated a while ago, I would require proof that he was insane—unless the law is that a man is presumed to be insane to start with.

Q. Well, every man is presumed to be sane. We start on that presumption, and we introduce evidence to prove that he was insane. Suppose the evidence was not sufficient to absolutely convince you that he was insane, but it was sufficient to raise a reasonable doubt in your mind as to whether he was insane or not—some reasonable, substantial doubt I mean—would you give him the benefit of that doubt and acquit him?

A. Why I certainly would. I wanted to make myself clear in the matter as far as I could.

(Defendants challenges peremptorily.) (3)

JOHN CLIFFORD, juror called and first duly sworn to answer truly on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

What is your name?
A. John Clifford.
Q. Where do you reside Mr. Clifford?
A. In Fairbanks.
Q. What is your occupation?
A. I'm not doing anything at the present time.
Q. What has been your occupation?
A. Mining the last two years.
Q. Where were you born?
A. Massachusetts.
Q. How long have you lived in the West?
A. Since 1898.
39 Q. You lived in the East before that?
A. Yes, sir.
Q. Have you ever sat on a trial jury in a case of this kind where the charge was murder?
A. Yes, sir.
Q. Where?
A. In Judge Wickersham's court.
Q. In what case?
A. United States against Perevitch four years ago.
Q. Is that the only time?
A. Yes; that's the only case of that kind.
Q. How long since you have been on a jury before this term?
A. Not since then; no, sir.
Q. Are you a married man or single?
A. Single.
Q. Have you ever heard this case discussed or talked about?
A. No, sir.
Q. Have you read anything about it?
A. I suppose so.
Q. If you read about it, did what you read leave any conviction in your mind as to the guilt or innocence of the defendant?
A. No, sir; I have no recollection of the facts.
Q. Are you acquainted with the defendant or with his father?
A. No, sir; I don't think so.
Q. Have you lived in the Chicken Creek country?
A. I was in the Fortymile district.
Q. Whereabouts did you live there?
A. On Canyon Creek.
Q. Did you know Bob Matheson there?
A. No, sir; never heard of him.
Q. Do you known of any reason why you could not sit on this case fairly and impartially and render a verdict according
40 to the law and the evidence?
A. No, sir.

Q. Where the defence of insanity is introduced in a case of this have you any such prejudicy against that defence as would influence your verdict?

A. No; I don't think I have.

Q. Do you feel you could give that the same consideration as to any other defence interposed?

A. Yes, sir.

Q. If there were evidence of insanity introduced, and while that evidence was not sufficient to convince you of the insanity of the defendant, yet if it raised a reasonable doubt in your mind as to his sanity, would you give him the benefit of the doubt?

A. Yes.

Q. Have you been on any other trial jury at this term?

A. Yes.

Q. What cases?

A. I was on the case of the United States against Pierce, the man sentenced this morning, and on the last case that *that* was tried—the Vachon case.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Have you talked to any of the witnesses for the defence in this case or have they talked to you?

A. No, sir; I don't know any of them.

Q. Has any one claiming to know the facts talked to you?

A. No, sir.

Q. Have you met or become acquainted with the defendant's father, Robert Matheson?

A. No, sir.

Q. What hotel do you stop at?

A. I have my own home.

41 Q. Has Mr. Dillon been your attorney in any matter?

A. No, sir.

Q. Have you any business relations with him?

A. No, sir.

Q. You have read the newspapers about the case, have you, Mr. Clifford?

A. I suppose so.

Q. From what you may have read or any one has talked to you about the case have you formed or expressed an opinion or impression as to the guilt or innocence of the defendant?

A. No, sir.

Q. So you can enter upon the trial of the case and listen to the evidence and instructions of the court and return a verdict accordingly?

A. Yes, sir.

Q. And would you do so?

A. Yes, sir.

Q. This is a case against the defendant for murder in the first degree where the punishment might be death. Do you entertain

such conscientious opinions as would preclude you from finding the defendant guilty if the evidence warranted it under the instruction of the court?

A. No, sir.

Q. So that if the evidence did warrant you in finding the defendant guilty under the instructions of the court, you would not hesitate to do so?

A. No, sir.

Q. And if the plea of insanity were interposed, as Mr. Dillon suggested, you would give it only that weight to which it is entitled under the instructions of the court in determining whether or not there was a reasonable doubt of the defendant's guilt?

A. I would.

(Juror accepted.) (3)

42 L. F. PROTZMAN, juror, called and first duly sworn to answer truly on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You live in town, do you not?

A. I do, Mr. Dillon.

Q. How long have you lived here?

A. Four years.

Q. Are you married or single?

A. Married.

Q. Where did you live before coming here?

A. Dawson.

Q. How long did you live there?

A. Since 1898 in the spring.

Q. Are you acquainted with the defendant in this case?

A. No, sir.

Q. Are you acquainted with his father, Bob Matheson?

A. Yes, sir; just casually.

Q. How long have you known him?

A. I knew him in Dawson.

Q. Have you ever heard or read about this case?

A. I read about it, I believe.

Q. How long since?

A. At the time it happened.

Q. Have you talked with anybody about it since?

A. No, sir.

Q. Did what you read or heard about the case cause you to form or express an opinion about the merits?

A. No, sir.

Q. Do you know of any reason why you can not sit as a juror in this case and hear the evidence and render a verdict according to the law and the evidence?

43 A. No, sir.

Q. Where the defence of insanity is introduced as a defence in a case of this kind have you any prejudice against it?

A. No, sir.

Q. Have you any prejudicy at all against such a defence?

A. No, sir.

Q. Would it take any more evidence to prove the fact of insanity in a case than it would any other fact?

A. No, sir.

Q. If there were evidence of the defendant's insanity, but not sufficient to prove to your satisfaction beyond a reasonable doubt that he was insane at the time of the commission of the act, yet if there was a reasonable doubt of his sanity would you give him the benefit of that doubt?

A. I would.

Q. And bring in a verdict of not guilty, under the instructions of the court, where such doubt existed?

A. Yes, sir.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Has Mr. Dillon been your attorney in any matter?

A. No, sir.

Q. You say you know the defendant's father; has he ever talked with you about the case?

A. No, sir.

Q. Has anyone else claiming to know the facts ever talked to you about the case?

A. No, sir.

Q. I understood you to say, in answer to Mr. Dillon, that you had talked about the case?

A. No, s[illegible].

44 Q. You said no?

A. Yes, sir.

Q. In a case of this kind, Mr. Protzman, where the penalty inflicted may be death, do you entertain any such conscientious scruples against that penalty as would keep you from finding a verdict of guilty if the evidence and the instructions of the court should warrant it?

A. Yes; I guess I have.

Q. That is, you are opposed to capital punishment?

A. Yes, sir.

(The Government challenges for cause. Juror excused.)

A. W. VANSANT, juror called and first duly sworn to answer truly upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside, Mr. Vansant?

A. Fairbanks.

Q. How long have you been here?

A. Five years.

Q. What is your occupation?

A. General laborer.

Q. Where did you live before coming here?
A. Before coming here I was in the Susitna prospecting.
Q. Where were you before that?
A. In the Copper River region.
Q. Before coming to Alaska, where did you live?
A. Baltimore, Maryland.
Q. What was your occupation there?
A. Policeman.
Q. How long were you on the police force?
A. Something over twelve years.
45 Q. Have you ever talked with anybody about this case?
A. I think I have.
Q. And have read about it?
A. Yes.
Q. From what you heard and read about the case have you formed an opinion as to the guilt or innocence of the defendant?
A. I have not.
Q. You feel that you could disregard what you read and heard wholly and be governed entirely by the evidence introduced and the instructions of the court?
A. I could.
Q. You were on the jury before this term?
A. Before this term?
Q. Before this term of court?
A. I was on a civil jury about two years ago.
Q. You never sat on a criminal jury before?
A. No; not before this term.
Q. Where the evidence of insanity, or the defence of insanity, is made, have you any prejudicy against that as a defence?
A. No.
Q. You feel you could give that the same consideration you would any other defence?
A. Yes.
Q. And would do so?
A. Yes, sir.
Q. Would it take any more evidence to convince you of the fact of insanity than any other defence?
A. No.
Q. If there was evidence of insanity not sufficient to convince you beyond all reasonable doubt as to the sanity of the defendant, but raised a reasonable doubt in your mind of his sanity at the
46 time the act was committed, would you give him the benefit of that doubt?
A. Yes, sir; I would.
Q. You said you were twelve years on the police force?
A. Yes, sir.
Q. Where?
A. In Baltimore City, Maryland.
(Defendant challenges peremptorily.) (4)

JOHN RONAN, juror called and duly sworn to answer truly upon his voir dire, testified as follows:

(By the JUROR.) Mr. Dillon, I am going to ask the court to excuse me, because I am sick to-day; I have a very severe headache and couldn't sit very well on the case.

The COURT. Is it satisfactory that the juror be excused under those conditions?

Mr. DILLON. Certainly.

(Juror excused for cause.)

H. CHADWICK, juror called and duly sworn to answer truly upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You reside at Rampart I believe, Mr. Chadwick?

A. Yes, sir.

Q. What is your occupation?

A. Miner.

Q. How long have you resided in Rampart?

A. Something over four years.

Q. And how long in Alaska?

A. Since 1898.

Q. Have you—you know what this case is about?

A. Yes, sir.

Q. Are you acquainted with the defendant?

47 A. No, sir.

Q. Do you know his father, Bob Matheson?

A. Not only by hearsay.

Q. Have you ever talked with anybody about this case?

A. Yes, sir; I have.

Q. And read about it?

A. No; we had no papers at all up there at the time.

Q. Did the person or persons you talked to pretend to know—purport to state the full facts of the case and know about it?

A. Nothing more than hearsay.

Q. Did what you heard about the case cause you form an opinion as to the guilt or innocence of the defendant?

A. No; I don't think it did.

Q. Do you feel that you can entirely disregard that and be governed entirely by the evidence in this case?

A. Well, I think I could; but I know some of the relatives and some of the witnesses in the case.

Q. I understand; but when you go into the jury box and consider the evidence in the case, do you think that what you heard said would influence you, or do you feel sure you would be governed solely and alone by the testimony of witnesses on the stand?

A. I do; yes, sir.

Q. You think what you heard or read wouldn't affect you in any way?

A. I do; yes, sir.

Q. Do you feel certain about that?

A. Yes; I feel certain about it.

Q. Where the defence of insanity is interposed, would that arouse any prejudice in your mind?

A. I don't think it would.

Q. Does it take more evidence to establøsh such a defence,
48 in your mind, than any other?

A. I don't think it would.

Q. If there was some evidence sufficient to raise a reasonable doubt as to the sanity or insanity of the defendant at the time of the commission of the act, would you give him the benefit of that doubt?

A. I think I would; yes, sir.

Cross-examination by Mr. CROSSLEY:

Has Mr. Dillon been your attorney in any matter, Mr. Chadwick?

A. No, sir.

Q. Have any of these witnesses—and I believe you said relatives—have they ever talked to you about the facts of the case?

A. No; I have never seen any of them since that time.

Q. The fact that you do know some of the relatives of this defendant and the witnesses, would that have any influence on your verdict in this case?

A. No, sir.

Q. Who do you know, Mr. Chadwick?

A. I know Mrs. Rothenburg's brother, and also Mr. Struck; whether any of them are in this case I don't know, but I understand Mrs. Rothenburg's brother is.

Q. That fact wouldn't have any influence on your decision in this case?

A. Not at all.

Q. Mr. Dillon asked you something about the defence of insanity. You would give that the consideration, after listening to the evidence, such as the court might instruct you it was entitled to?

A. Yes, sir.

49 Q. Have you any such conscientious opinions in regard to the death penalty that would keep you or preclude you from finding the defendant guilty because of the fact that the punishment might be death, if the evidence warranted that punishment under the instructions of the court?

A. I have not.

Q. In other words, you have no conscientious scruples or opinion against the infliction of the death penalty where it is warranted under the evidence and the instructions of the court?

A. No, sir.

Q. Your wife is with you in Fairbanks, is she, Mr. Chadwick?

A. Yes, sir.

Q. And she is pretty well acquainted with some of the defendant's witnesses—or are you?

A. I don't think she knows any of them—we have never spoken of any of them.

Q. None of them have called upon you or her at your cabin or your home?

A. No, sir.

(The juror is accepted.) (4)

H. MERRITT, juror called and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

How long have you lived in Fairbanks, Mr. Merritt?

A. About four and a half years, Mr. Dillon.

Q. What is your age?

A. Twenty-five.

Q. And you are in the employ of the Telephone Co., are you not?

A. Yes, sir.

50 Q. Have you ever sat on a jury before this term of court?

A. Once, in the commissioner's court.

Q. Never on the regular panel?

A. No, sir.

Q. What jury have you been on during this term?

A. Well, the McGinnis case and the Deetering case, I think is all—O, yes; I was on the jury that tried the gentleman that was here this morning—the Pierce case.

Q. Have you ever talked to anybody about this case?

A. No, sir; I have not.

Q. You have read about it?

A. I think I read about it at the time.

Q. You read the Evening News?

A. Yes, sir; sometimes.

Q. Did you notice anything—an article in that paper that purported to give what would be a part of the evidence in this case?

A. No, sir; I did'nt notice it.

Q. Did what you read cause you to form an opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. Do you know the defendant?

A. No, sir.

Q. Do you know his father?

A. I know him by sight, yes, sir.

Q. Do you know of any reason why you cannot sit as a juror in this case?

A. Well, the penalty in the case is death, is it?

Q. Yes; it may be.

A. If convicted in the first degree. I wouldn't really care to sit on it if that is the case.

Q. Where the defence is insanity, have you any prejudice against that as a defence?

51 A. It would have to be proven to a certainty to me.

Q. Would have to be proven to a certainty?

A. Yes.

Q. Then if there were a doubt in your mind as to his insanity at the time of the commission of the act, you wouldn't give him the benefit of that doubt?

A. Well, I don't say that.

Q. Well, now, suppose there were evidence as to the sanity of the defendant, but it was not quite strong enough to convince you that he was insane—yet there was some doubt about that and your mind was on a balance and you couldn't come to a conclusion in your mind—that is, you wouldn't want to say that he was sane or that he was insane—in that case would you give him the benefit of the doubt and acquit him?

A. If there was a reasonable doubt that he was insane, then he must be sane.

(Defendant challenges for cause.)

Mr. CROSSLEY. We don't resist, since he has stated he is opposed to the death penalty.

(Juror excused for cause.)

R. W. TAYLOR, juror, called and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You reside in Fairbanks, do you not?

A. Yes, sir.

Q. How long have you lived here?

A. A little over four years.

Q. Are you acquainted with the defendant in this case?

A. No.

52 Q. Are you acquainted with his father?

A. I met his father a little while ago.

Q. Have you ever had any talk with anybody about this case?

A. No; I couldn't talk to him about the case.

Q. Have you read about it?

A. Yes, sir.

Q. Did you read the account in the Evening News?

A. Yes, sir.

Q. Did you read an article a few days ago in that paper about this case?

A. I think it said there was to be a defence of insanity.

Q. Did you read something as to what the witnesses would testify?

A. No; I read merely the heading of the article.

Q. Well, from what you read have you formed or expressed an opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. Have you any opinion now as to his guilt or innocence?

A. No.

Q. How long have you lived in Alaska?
A. Eight years.
Q. Before coming to Alaska where did you reside?
A. In southwestern Michigan.
Q. How long were you there?
A. About two years.
Q. Have you ever sat on a trial jury of this kind?
A. No.
Q. Have you ever sat on a criminal case?
A. I was on one jury here, I believe.
Q. What case?
A. On the McGinnis case. I have sat in the commissioner's court, and also on juries in Nebraska.

53 Q. Where the defence of insanity is interposed to be relied on by the defendant, have you any prejudice against such a defence?
A. No.
Q. You think you could give the same consideration to that as any other defence?
A. I could.
Q. Would you require any stronger or better evidence to convince you of that fact than any other that you know of?
A. No, sir.
Q. If there were a reasonable doubt in your mind as to the sanity or insanity of the defendant at the time of the commission of the act, would you give him the benefit of such doubt?
A. I would.
Q. You have no prejudice against that defence?
A. No.
Q. You believe that a person who is insane should not be held responsible for his acts?
A. No, sir; if they are insane at the time.
Q. Have you any relations with the prosecution?
A. No.
Q. There is a close friendship between you and Mr. Clegg?
A. Yes, sir; there is, Mr. Dillon.
Q. Your families are very intimate?
A. Yes, sir.
Q. Do you think that would make any difference with you, Mr. Taylor?
A. No; it would not.
Q. You feel sure it would not?
A. I feel sure it would not.
(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

54 Mr. Dillon hasn't been your attorney in any matter?
A. No, sir.
Q. You say you know the defendant's father?

A. Yes, sir; he began to speak to me about the case and I told him I was on the panel and wouldn't discuss the case.

Q. That was this fall?

A. About a month or six weeks ago.

Q. Has anyone else talked with you about it?

A. No.

Q. From what you have read, or what Mr. Mathseson said there that day, have you formed an opinion or has any impression been created in your mind as to the guilt or innocence of the defendant?

A. No, sir.

Q. How long have you known Mr. Mathseon, the father of the defendant?

A. I have known him since he came down here, a month or six weeks ago.

Q. You have no intimate business relations or in a social way?

A. No.

Q. Nothing that would in any way cause you to be prejudiced in favor of or against the defendant or the Government?

A. No.

Q. Are you—in this case, Mr. Taylor, the punishment if the dedenfant is found guilty may be death, this being a charge of murder in the first degree. In that case, do you entertain such conscientious opinions as would preclude you from finding the defendant guilty if the evidence under the instructions of the court warranted it?

A. No.

Q. In other words, you are not opposed to the infliction of the death penalty if the evidence is sufficient?

A. I am not.

55 Q. Do you know of anything, Mr. Taylor, that would preclude you from acting as a fair and impartial juror in this case if you are selected as such?

A. I do not.

Q. And you would so act, Mr. Taylor?

A. I would.

Q. And determine the issues solely upon the evidence under the instructions of the court?

A. I would.

(The juror is accepted.) (5)

A. E. MALTBY, juror, called and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You are occupied as a clerk in Hall's stationery store, are you not?

A. I am.

Q. How long have you been in this part of Alaska?

A. Since 1906.

Q. Where did you come from to this place?

A. From Dawson.

Q. Where did you come from to Dawson?
A. From Juneau.
Q. I mean from what part of the outside.
A. Seattle.
Q. How long were you in Seattle?
A. From 1890.
Q. What was your occupation while there?
A. Studying law.
Q. Were you admitted to the bar?
A. I was.
56 Q. Have you ever practiced law?
A. I have.
Q. Where?
A. In southern Oregon and Juneau.
Q. How long altogether?
A. O, about six years altogether.
Q. You never practiced law here?
A. No.
Q. Are you acquainted with the defendant in this action?
A. No, I am not.
Q. Are you acquainted with his father, Bob Matheson?
A. No.
Q. Have you read anything about this case?
A. I may have at the time, but I haven't any recollection of the facts.
Q. Have you read the evening News in the last few days?
A. I probably have.
Q. Did you notice anything in the News about this case?
A. No.
Q. Have you talked with anybody about the case?
A. No, I don't believe I have.
Q. Have you heard it discussed more or less in your place?
A. I presume I have, yes.
Q. Did those discussions make any impression on your mind as to the guilt or innocence of the defendant?
A. No, sir.
Q. Have you any such opinion or impression as to his guilt or innocence?
A. No.
Q. Have you any prejudicy against the defence of insanity where it is interposed in a case of this kind?
A. Yes; I believe I have.
Q. You don't believe in anything of the sort?
57 A. No, I don't think I do.
(Defendant challenges for cause.)
Mr. Crossley: We do not resist; we have understood that Mr. Maltby hasn't been feeling well for the last few days.
(Juror excused for cause.)

W. H. BROWNING, juror, called and first duly sworn, testified as follows on his voirdire:

Direct examination by Mr. DILLON:

Where do you reside, Mr. Browning?

A. At Fox.

Q. How long have you resided there?

A. O, something over a year now.

Q. Where did you reside before that?

A. On Chicken Creek and Jack Wade.

Q. You are acquainted, then, with the Mathesons?

A. Yes, sir.

Q. How long have you known them?

A. O, I think six or seven years.

Q. Have you heard anything about this case?

A. Yes, sir.

Q. Talked about it?

A. Yes, sir.

Q. Naturally it aroused a great deal of interest in your mind when you heard of it?

A. O, some—yes.

Q. Have you formed an opinion as to the guilt or innocence of the defendant from what you heard and read and know about it?

A. Well; I suppose I did—I couldn't swear to it.

Q. Have you that opinion now?

A. Well; I suppose so.

58 (Defendant challenges juror for cause. The Government resists.)

Cross-examination by Mr. CROSSLEY:

Could you disregard that opinion, and try the cause on the evidence and the instructions of the court?

A. Well, I wouldn't like to sit on the case, Mr. Crossley. I know all of them, the defendant and both of the boys, the one that got killed—both of them worked for me; this young man I have known for years, and his father I have known very well, and I don't think it would be right for me to sit on the case, anyway.

Q. Well, what do you think; could you disregard the opinion you now have?

A. I suppose if I had to, I would; I would do the best I could.

The COURT. You think, though, it might influence your verdict, Mr. Browning?

A. Well, I suppose so. I wouldn't like to take the chance, any way.

The COURT. I think, under the circumstances, the challenge should be sustained. You are excused, Mr. Browning.

THOMAS L. JOHNSON, juror, called and first duly sworn, testified on his voir dire as follows on—

Direct examination by Mr. DILLON:

Where do you reside, Mr. Johnson?

A. In town, here.

Q. How long have you resided here?

A. About two years, altogether.

Q. What is your occupation?

A. Prospector and miner.

59 Q. Are you acquainted with the defendant in this case?

A. No, sir,

Q. Do you know his father, Bob Matheson?

A. I don't know him.

Q. Have you ever talked with anybody about this case?

A. I may have.

Q. Do you remember what that conversation was—I don't ask you to repeat it—but do you remember what was said?

A. Nothing about the case; no, sir.

Q. Did you read the papers concerning the case?

A. Yes.

Q. Did what you read or the conversation that you had cause you to form an opinion as to the guilt or innocence of the defendant?

A. No.

Q. Have you any opinion as to his guilt or innocence now?

A. No, I have not.

Q. You think you could be governed entirely and would be governed entirely by the evidence as to the facts—take the *the* evidence from the witnesses and the law from the court, and that alone would influence you when you retired to your jury box to consider your verdict?

A. Yes, sir.

Q. Now, where the defendant pleads that he was insane at the time the act was committed, have you any prejudic*y* against that as a defence?

A. O, I can't say that I have.

Q. Would it take any more evidence to convince you of that fact than any other fact that might be offered as a defence?

A. I don't see that it would.

Q. Would you give the evidence the same consideration, the

60 same weight as you would evidence of any other fact, and if convinced that the defendant was insane at the time the act was committed acquit him—if the court should instruct you that that is a good defence?

A. I think so.

The COURT. Do you understand the question, Mr. Johnson?

A. I think I do; I would say yes.

Mr. DILLON. If there was evidence of insanity, but not enough to convince you beyond all reasonable doubt that he was insane, yet

enough to raise a reasonable doubt in your mind—in other words, if the evidence should leave your mind in such a state that you couldn't say to your own satisfaction whether the defendant was sane or insane at the time of the commission of the act, would you give him the benefit of that doubt in such a case?

A. Well, I should think I would.

Q. Do you know you would? If you had a reasonable doubt—supposing you couldn't make up your mind whether he was sane at the time or not—would you give him the benefit of the doubt and acquit him if the court should instruct you that that was the law?

A. I would; yes.

Q. Do you know of any reason why you couldn't set as a juror in this case, and why you couldn't render a just, fair, and impartial verdict under the law and the evidence?

A. No, sir.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

You have been a miner, you say, Mr. Johnson?

A. Yes, sir.

Q. And you know Mr. Dillon?

A. No, sir.

61 Q. Do you know any of the witnesses in this case?

A. No, sir.

Q. Are any of them stopping at the Third Avenue Hotel where you stop?

A. No, sir; not that I know of.

Q. Have any of them, or any other persons, talked with you about this case—persons who claimed to know the facts in the case?

A. No, sir.

Q. Have you formed an opinion from what you read about the case as to the guilt or innocence of the defendant?

A. No, sir.

Q. Have you any such conscientious opinions as would keep you from finding the defendant guilty in this case, because if he is found guilty of murder in the first degree, as charged, he might have to suffer the penalty of death? In other words, are you opposed to the infliction of the death penalty?

A. I don't believe in it.

Q. You don't believe in the death penalty in any case?

A. In any case.

Q. You are opposed to the death penalty in any case?

A. Yes.

Q. Even if the evidence would warrant it? You wouldn't find the defendant guilty at all if the penalty was death, is that what I understand you?

A. Yes, sir.

(Government challenges for cause.)

The COURT. I understand you to say you are opposed to capital punishment or the infliction of the death penalty, no matter what the evidence might be. If called as a juror in this case and the
62 evidence should show the defendant was guilty beyond all reasonable doubt of the crime charged, which is murder in the first degree, would you refuse to find him guilty because he might receive the death penalty?

A. Well, I'm rather undecided about that, Judge.

The COURT. Very well, I think under the circumstances—do you resist the challenge, Mr. Dillon?

Mr. DILLON. I would like to ask him some further questions.

Redirect examination:

Now if Mr. Johnson—you understand that in this case if the defendant is found guilty he may be hanged—in other words the death penalty may be imposed. Now, knowing that, although you may be opposed to capital punishment, still if the evidence justified it and convinced you that he was guilty of murder in the first degree, would you bring in that kind of a verdict in this case?

A. Well, perhaps I would, for the reason that I believe in the enforcement of the law.

Q. And since that is the law, if the evidence justified that kind of a verdict, you would bring in that kind of a verdict?

A. Yes, sir.

(The challenge is resisted.)

Recross-examination by Mr. CROSSLEY:

I understood you to say Mr. Johnson that you had such conscientious scruples as would prevent you from bringing in a verdict if you knew the penalty might be death; is that true?

A. Well, I am not quite—as I told the court I am undecided on that point; maybe I didn't understand the question.

Q. Well, I will ask you then in this way. You have such
63 opinions or scruples against the death penalty that you wouldn't want to find the defendant guilty even though the evidence was sufficient, on account of the fact that he might have to be hung if he was found guilty—is that true?

A. Well——

Q. How is that Mr. Johnson?

A. It would have to be considered—as I said, I don't believe in the death penalty, and on the other hand I do believe in the enforcement of the law.

The COURT. If he entertains such scruples against the death penalty as would preclude him from finding a verdict he is disqualified under our statute. But I am not just clear as to how the juror feels about that. Let me ask you Mr. Johnson: If the evidence in this case should convince you beyond all reasonable doubt that the defendant in this case was guilty of murder in the first degree, now would you hesitate to find him guilty of murder in the first degree because he might be executed under the law?

A. Well, perhaps it would for the reason that I don't believe in the death penalty.

The COURT. Very well; I think the challenge should be sustained.

(Defendant excepts.)

(Whereupon two bailiffs were sworn and the jury retires in their charge during the noon recess.)

2 P. M., 9–7–09.

R. S. BOYD, juror called and first duly sworn, testified on voirdire as follows on—

Direct examination by Mr. DILLON:

You reside here in town, Mr. Boyd?

A. Yes, sir.

64 Q. You know what this case is?

A. Yes, sir.

Q. Have you talked with anybody about it?

A. No, sir.

Q. Have you read about the case in the newspapers?

A. I have.

Q. When?

A. At the time it happened.

Q. Have you read the papers about it in the last few days?

A. No, sir.

Q. Did what you read cause you to form or express any opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. Are you acquainted with the defendant, George Matheson?

A. No, sir.

Q. Do you know his father?

A. No, sir.

Q. Are you acquainted with what is called the Chicken Creek country at all?

A. No, sir.

Q. Where are you from originally, Mr. Boyd—where were you born?

A. I was born in Virginia.

Q. How long since you left there?

A. Well, nearly forty years now.

Q. Where did you grow up?

A. In California.

Q. What is your occupation?

A. I was formerly in business—merchandise.

Q. How long since you left California?

A. About three years.

Q. You lived there until that time?

A. Yes, sir.

Q. Are you a married man or single?

65 A. Married.

Q. How long have you been married?

A. About eighteen years.
Q. Have you a family here with you?
A. No, sir.
Q. Have you any children?
A. Yes, sir.
Q. Did you ever sit on a jury in a criminal case before?
A. Not until this session of court.
Q. Have you ever been on a jury in a murder case?
A. No.
Q. What jury were you on in this court?
A. I was on the first case—the McGinnis case—or the second case of this session, and the Pierce case, and the Vachon case—that's all.
Q. You know no litigation before the court at this time?
A. No.
Q. Mr. Clegg or Mr. Crossley are not your attorneys at this time?
A. No, sir.
Q. Have you any prejudicy against the defence of insanity in the case of a man accused with this crime?
A. I can't say that I have.
Q. Would you give the same consideration to that sort of a defence as any other?
A. Yes, sir.
Q. If there were not sufficient evidence to convince you beyond all reasonable doubt as to the sanity of the defendant at the time of the commission of the act, but sufficient to raise a doubt in your mind so that you couldn't say whether he was sane or insane, would you give him the benefit of the doubt according as the court might
66 instruct you as to what you should do in that matter?
A. Well, I should go according to the instructions.
Q. If the court should instruct you that you should give him the benefit of the doubt as to whether he was same or not would you do so?
A. Yes, sir.
Q. And if the court should instruct you that there was such doubt, you would take that into consideration in arriving at a verdict as to whether or not he was guilty?
A. Yes, sir.
Q. Do you know of any reason why you should not sit as a juror in this case?
A. No, sir.
Q. Would the fact that the defendant has been indicted, would that have any influence on your mind, or would you require the state to prove his guilt beyond all reasonable doubt?
A. Yes; I would require that—I think we have been instructed that way.
(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Mr. Dillon hasn't been your attorney in any matter?

A. No, sir.

Q. At the first of this term you stated you were ill in some manner. Is there any reason now why you should not sit in this case and hear the evidence *and hear the evidence* and render a verdict according thereto and the instructions of the court?

A. No, sir.

Q. Your health is better than at the first of the term?

67 A. Yes, sir.

Q. So you read all about this case, did you?

A. I did at the time it happened; yes, sir.

Q. Did that cause you to form or express an opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. Do you know any of the witnesses who are to testify in this case?

A. No, sir.

Q. Either for the defendant or for the Government?

A. Why, I dont know all of the witnesses or, in fact, any of them—at least, not any of those that were in court this morning.

Q. Where the defendant is accused of a crime of this kind—that is, murder in the first degree, and the penalty under the law may be death, do you entertain any conscientious scruples or opinion as to that penalty that would prevent you finding a verdict against the defendant if the evidence warranted it?

A. No, sir.

Q. In other words, you have no conscientious scruples against that punishment?

A. No, sir.

Q. What part of Virginia did you come from, Old Virginia or West Virginia?

A. Old Virginia.

Q. What was the nearest part of—what was the nearest city?

A. Well, it was in the western part of Virginia.

Q. In the Shenendoah Valley?

A. Well, I was just three years old when we left there, and I dont remember much about the location.

Q. You think, then, you can enter upon the trial of this case without any prejudice for or against the defendant or for

68 or against the Government?

A. Yes.

Q. And try the case absolutely fairly and impartially as between the Government on the one hand and the defendant on the other?

A. Yes, sir.

Q. And will you do that?

A. Yes, sir.

(The juror is accepted.) (6)

JOHN LITSEY, juror, called and first duly sworn, testified on his voirdire as follows on—

Direct examination by Mr. DILLON:

You reside here in town, Mr. Litsey?

A. Yes, sir.

Q. Where are you from originally?

A. Kentucky.

Q. How long is it since you left there?

A. Eleven years.

Q. What was your occupation there?

A. I was going to school.

Q. You were not engaged in any business at that time—how old are you now?

A. Twenty-nine.

Q. You left Kentucky eleven years ago?

A. Yes, sir.

Q. And where have you been since that time?

A. Cincinnati, Seattle, and Fairbanks.

Q. Were you engaged in business in Seattle?

A. Yes, sir.

Q. What business?

69 A. The grocery business.

Q. And have been in the grocery business since?

A. Yes, sir.

Q. Have you ever talked with anybody about this case?

A. Yes, sir.

Q. Who did you talk to?

A. Well, my wife came down on the boat with the boy's mother and father before the court was called.

Q. Did she purpoert to have heard what the facts were in the case?

A. Yes, sir.

Q. Did that cause you to form an opinion or to express an opinion as to the defendant's guilt or innocence?

A. In a way it did; yes.

Q. Is that such an opinion as might influence you in the jury box in considering the case?

A. It might unconsciously—of course I would try and not let it, consciously.

Q. You are not entirely satisfied that it might not have some weight with you?

A. No, I am not satisfied.

Q. And have you read the newspaper accounts of this case?

A. Yes, sir.

Q. You never talked with anybody else about the case?

A. No, sir.

(Defendant challenges for cause. Juror excused.)

J. A. JESSON, juror, called and first duly sworn on voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Q. You reside on Ester Creek, I believe, Mr. Jesson?
70 A. On Ester Creek.
Q. Where did you reside before coming to Alaska?
A. In San Francisco.
Q. How long did you reside there?
A. Beg pardon?
Q. How long did you reside there?
A. Let's see—since 1893.
Q. You resided there since 1893, in San Francisco?
A. Yes, sir; it has been my home.
Q. Where did you reside before that?
A. In Fresno City.
Q. You were born in California?
A. No, sir; in Kansas.
Q. What was your business in California?
A. Well, I was with the Pacific Occidental and Oriental Steamship Company, and also in the newspaper business.
Q. Principally the clerical business?
A. Yes. sir.
Q. Are you married or single?
A. Single.
Q. How old are you?
A. Nearly thirty-six years.
Q. Have you ever sat as a juror in a case of this kind?
A. Not a case of this kind, no, sir.
Q. Did you ever sit as a juror in a criminal case before this term?
A. Except in the commissioner's court in the case of the chief of police, Bud Miller.
Q. Have you ever talked with anybody about this case?
A. Yes, sir.
Q. Did that conversation that you had cause you to form an opinion as to the guilt or innocence of the defendant?
A. No, not as to his guilt or innocence.
71 Q. Did the person or persons with whom you talked pretend to know the facts of the case?
A. No, not the facts—they knew the people.
Q. That was all?
A. Yes, sir.
Q. The facts of the case were not detailed to you?
A. No.
Q. Do you think what was said to you would influence you in any way in arriving at a verdict after having heard the instructions of the court and the evidence?
A. No, sir; I don't think so.

Q. You feel satisfied it would not?

A. Yes, sir.

Q. Are you conscious of any reason why you should not sit on this case and try it impartially?

A. Well, any more than I have a slight opinion in the case.

Q. You have, then, an opinion in your mind at the present time as to the guilt or innocence of the defendant, or as to whether or not he should be punished?

A. I might call it an opinion; I wouldn't call it one of any importance; it would make no difference in giving the defendant a fair decision, I don't believe.

Q. How did you arrive at that opinion?

A. Just merely what I heard from people that was interested or people that were familiar with the upper country and knew them; it made no particular impression.

Q. But did it make any impression as to his guilt or innocence?

A. A slight impression, yes, sir.

Q. Where the defence of insanity is interposed, would that arouse any antagonism in your mind, or have you any prejudice against the defence of insanity?

A. No; not against that as a defence, any more than I be-
72 lieve it has been abused.

Q. Now, would you require any more or stronger evidence to support that than you would any other substantial defence?

A. I don't believe I would.

Q. You would give the defence of insanity the same consideration and weigh the evidence in regard to it fairly and impartially?

A. Yes, sir.

Q. And if the court should instruct you that if he were insane that would excuse him from the consequences of his act, you would return a verdict accordingly?

A. I would.

Q. If there were evidence of insanity, not sufficient to convince you of his insanity, but to raise a reasonable doubt as to the fact of insanity at the time the crime was committed—if the evidence were insufficient for you to conclude, as a matter of fact, whether or not he was insane to that extent as to be excused from the consequences of his act, would you give him the benefit of the doubt if the court should instruct you that was the law?

A. Yes; I would give him the benefit of any doubt that was reasonable.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Did you know the defendant's parents in California?

A. No, sir.

Q. And you haven't met them in Alaska?

A. No.

Q. In response to Mr. Dillon, you said you had some opinion. What was that opinion, in regard to his sanity or insanity?

73 (Objected to on the ground that the Government has no right to ask what the opinion was.)

The COURT. I think he has a right to inquire as to what the opinion goes to, but not what that opinion is. He hasn't asked him to state specifically what the opinion is. The objection is overruled.

(Defendant excepts.)

Mr. CROSSLEY. You stated you had no opinion as to the guilt or innocence of the defendant, but indicated that you might have an opinion as to some other matter. Now, was that as to his sanity or insanity—you don't need to state which one?

A. It was not.

Q. Then you really have no opinion whatever in regard to the case?

A. No; not in regard to the case. It is really—what slight opinion I have formed is really of no importance, and would make no difference in my consideration of the case.

Q. You feel you can disregard that, whatever it is, and try the case fairly and impartially?

A. It is so slight that it wouldn't make any difference one way or the other.

Q. It wouldn't take evidence to remove it?

A. No, sir.

Q. You would, if called as a juror, try the case upon the evidence submitted in court?

A. Yes, sir.

Q. You are not prejudiced for or against the Government or the defendant?

A. No, sir.

Q. This being a case wherein the defendant is charged with murder in the first degree, and where the defendant, if found

74 guilty, might suffer death, do you entertain any such conscientious scruples against the infliction of the death penalty as would prevent you from finding a verdict if the evidence were sufficient under the instructions of the court?

A. No, sir.

Q. In other words, you have no conscientious scruples against the infliction of the death penalty where the evidence warrants it?

A. Where the evidence warrants it, no sir.

Q. You have some litigation pending in this court?

A. I have none personally; my brothers have.

Q. But Mr. Dillon is not your attorney, or your brother's?

A. No.

Q. And the fact that you have such litigation in court that would have nothing to do with your consideration of the evidence and the law in this case?

A. Not at all.

Q. You would be absolutely fair and impartial as far as that is concerned.

A. Yes, sir.

(The juror is accepted.) (7)

J. M. BROOKS, juror called and first duly sworn, on voir dire testified as follows on—

Direct examination by Mr. DILLON:

Q. You are a resident of Fairbanks?

A. Yes, sir.

Q. Where are you from originally, Mr. Brooks?

A. Michigan.

Q. How long did you live there?

A. Until I was twenty years of age.

75 Q. Since that time, where?

A. Illinois—Chicago, Montana, and Idaho.

Q. What has been your occupation most of the time?

A. Why, since I came to the West I have been mining principally; in the East I was raised on a farm.

Q. How long have you been in Alaska?

A. I have been here since 1895.

Q. Do you know what this case is about?

A. Yes, sir.

Q. Are you acquainted with George Matheson, the defendant?

A. I think I used to know a Matheson in the Fortymile country, but I don't know whether this is the one or not.

Q. Bob Matheson?

A. Yes, sir; Bob Matheson.

Q. How long ago was that?

A. Why, that was in 1899 and 1900.

Q. Was your acquaintance with him intimate?

A. No; I didn't know the man very well; I knew it was Bob Matheson and used to see him sometimes going up and down the river.

Q. Have you ever talked with anybody about this case?

A. Not particularly; no, sir.

Q. You read about it, I suppose?

A. Yes, sir.

Q. Did what you read cause you to form an opinion as to his guilt or innocence?

A. No; I think not.

Q. Have you any such opinion now?

A. No, sir; I have no opinion.

Q. Knowing the defendant's father wouldn't have anything to do with your consideration of the evidence and the instructions of the court in this case?

A. No, sir.

76 Q. Have you any prejudicy against the defence of insanity when interposed in a case of this kind?

A. No; I have not.

Q. Would you give it the same consideration you would any other defence?

A. Yes, sir.

Q. If evidence of insanity were introduced, and that evidence of insanity while not sufficient to convince you thoroughly that the defendant was insane at the time he committed the act, yet it raised a reasonable doubt in your mind as to his sanity at the time he committed the act; in other words, if such evidence left your mind in that condition that you couldn't come to any conclusion satisfactory to yourself as to whether or not he was insane, and the court should instruct you that he was entitled to the benefit of the doubt, would you give him the benefit of such doubt and acquit him?

A. Yes, sir.

Q. And you would do so?

A. Yes, sir.

Q. Do you know of any reason why you couldn't try this case fairly and impartially if called as a juror?

A. Yes, sir; I think I do.

Q. You say you know of some reason?

A. Yes, sir.

Q. What is it?

A. I don't believe in capital punishment.

Mr. DILLON. Well, under the law it isn't my province to challenge you for that reason, but I think it is sufficient cause.

The COURT. It is sufficient under our statute; you may be excused, Mr. Brooks.

77 CARL THIELE, juror called and first duly sworn, on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Q. Where do you reside, Mr. Thiele?

A. Fairbanks.

Q. How long have you lived here?

A. About four years.

Q. What has been your occupation?

A. Mining and prospecting, and the newspaper business.

Q. Where did you live before coming here?

A. Spokane, Washington.

Q. How long did you live there?

A. About—between four and five years.

Q. And before that?

A. In Chicagi, Illinois.

Q. Where were you boen?

A. Grand Rapids, Michigan?

Q. What was your occupation in Spokane?

A. Express messenger for the Pacific Express Company.

Q. Before coming there what was your occupation?

A. I was clerk in a hotel in Chicago.

Q. Have you talked to anybody about this case?
A. I have not.
Q. Have you read about it?
A. I have.
Q. In what paper?
A. Well, about the time it happened—I don't remember what paper it was in.
Q. Have you read the papers the last few days—the News?
A. Yes.
Q. Did you see an account of this case in the News the last
78 few days?
A. I did.
Q. You saw an account mentioning some of the witnesses and what they would testify to—the nature of their testimony?
A. Yes, I believe I did.
Q. Did what you read cause you to form or express an opinion as to the guilt or innocence of the defendant?
A. I have no opinion; no, sir.
Q. You feel that your mind is in such a condition that you can in absolute fairness to the defendant and the State try this case on the evidence and the instructions of the court?
A. Yes, sir.
Q. Have you any prejudicy against the defence of insanity?
A. I am.
Q. You are prejudiced against it, are you?
A. I am.
(Defendant challenges for cause. The Government resists the challenge.)
By the COURT. Mr. Thiele, if the defence of insanity should be interposed in this case, and the evidence as to that matter should raise a reasonable doubt in your mind as to the guilt of the defendant, could you resolve that doubt in his favor and acquit him?
A. No; I don't think I could.
Q. You think you are so prejudiced against the defence of insanity that whatever evidence might be offered in support of it, even if it raised a reasonable doubt in your mind, you couldn't resolve that doubt in favor of the defendant and acquit him?
A. No; I don't think I could.
(Juror excused for cause.)

79 JOHN A. WEBB, witness called as a juror to testify on his voir dire, being first duly sworn, testified as follows on—

Direct examination by Mr. DILLON:

Q. Where do you reside, Mr. Webb?
A. Over in Graehl.
Q What is your first name did you say?
A. John A.
Q. How long have you resided in Alaska?

A. I came to Alaska in May, 1900; then I have been outside for about eighteen months in the Dawson country.

Q. Where did you live before that?

A. I lived in California for eight years before I came north?

Q. What was your occupation there?

A. Part of the time farmer and part of the time butcher.

Q. And before that?

A. I was raised in Iowa.

Q. What was your occupation there?

A. Farmer.

Q. How long did you work in California?

A. Two years—I was a meat cutter in a shop.

Q. You also lived in Dawson?

A. I was there for four or five months, in the vicinity of Dawson.

Q. What have you been doing here?

A. I have been prospecting some, but most of the time I have been cutting wood.

Q. Are you a married man?

A. No, sir.

Q. How old are you?

A. Forty-three.

Q. Are you acquainted with the defendant in this case?

80 A. No, sir.

Q. Or with his father Bob Matheson?

A. No, sir.

Q. Have you read anything about this case?

A. I don't know whether I read it or not, but I heard about it at the time it happened.

Q. Have you talked about it since that?

A. Only in a casual way.

Q. How long since you have had any conversation about the case, Mr. Webb?

A. Well, some people asked me to-day what case was on trial in court.

Q. Have you talked about the facts or details of the case, or merely mentioned the fact that such a case was coming up for trial—that wasn't with any of the witnesses in the case?

A. No, sir.

Q. Has anybody ever detailed to you what the facts of the case or what purported to be the facts?

A. No, sir.

Q. Have you talked with anybody at all about the merits of the case?

A. No, sir; I have not.

Q. Have you any opinion as to the guilt or innocence of the defendant at this time?

A. I have not.

Q. Are you conscious of any reason why you could not sit as a fair and impartial juror in this case, and try the case fairly on the evidence as between the State and the defendant?

A. I do not.

Q. If the defence of the defendant to be interposed in this
81 case were insanity, would you have any prejudice against that as a defence?

A. No; I have not.

Q. Would you give that the same consideration you would any other defence in a criminal case?

A. I would.

Q. Do you believe that where a person is insane that that would excuse them for their acts, where they are insane to the extent that the law usually excuses them?

A. Why yes; I do.

Q. Then if it were shown here beyond a reasonable doubt that the defendant at the time he committed the act were insane to the extent that the court will instruct you is sufficient to excuse him from the consequences of his act, you would give him the benefit of that?

A. I would.

Q. If the evidence in this case as to the question of insanity should raise a doubt in your mind as to whether or not at the time of the commission of the offence the defendant was insane; in other words, if after hearing the evidence you could not make up your mind whether he was or was not insane, but there was a reasonable doubt as to that fact, would you give the defendant the benefit of the doubt?

A. I would.

Q. Have you ever sat before this term of court as a juror in a criminal case?

A. No, sir.

Q. What cases have you been on this term?

A. Well, the first four; there was a fellow from Chena that was tried for robbery——

Q. That was the McGinnis case?

A. Yes, sir.

Q. You were on the Dunn case?
82 A. Yes, sir.

Q. On the Deetering case?

A. Yes, sir.

Q. Were you on the Pierce case?

A. No, sir.

Q. On the Vachon case?

A. No.

Q. What other case have you served on?

A. Well, the fellow that robbed One-eyed Pete—whatever that case was.

(Defendant challenges peremptorily.) (5)

The regular panel being exhausted, the court ordered a special venire of 20 jurors to be summoned from the body of the district, returnable at 4 o'clock p. m. of this date.

(4 p. m., after qualification of talesmen.)

DAVID FINLEY, being called from the special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Q. Where do you live, Mr. Finley?
A. I live at Ester Creek at present.
Q. How long have you been there?
A. About five months.
Q. What are you doing there?
A. Mining.
Q. Working for wages?
A. Yes, sir.
Q. Who are you working for out there?
A. I have been working for McRay & Hunter.
Q. Where did you come from to the north?
A. From the State of Washington.
83 Q. How long had you lived there prior to coming north?
A. Nine years.
Q. What business did you follow there?
A. Logging.
Q. How old are you?
A. Thirty.
Q. Married or single?
A. Single.
Q. Have you ever heard anything about this case?
A. No, sir; excepting the other day I read it in the paper.
Q. When was that?
A. Not until the other day, I read when this trial was coming off.
Q. Did you see an article published in one of the papers which stated what some of the witnesses would testify to?
A. No, sir—just as to when it was coming off.
Q. You didn't read anything about the facts of the case?
A. No, sir.
Q. Have you any opinion in the matter as to the guilt or innocence of the defendant?
A. No, sir.
Q. Have you ever been a juror before?
A. No, sir.
Q. You have sat on a jury of no kind—none at all?
A. Not except a coroner's jury.
Q. When was that?
A. That was in California.
Q. You lived in California, did you?
A. I was there during the panic of 1907 for awhile is all.

Q. Do you know of any reason why you couldn't fairly and impartially try this case as a juror?

A. No, sir.

Q. You understand that the defendant is presumed to be innocent until he is proven guilty—that the burden is on the State or the prosecution, and they should prove him guilty——

84

A. Yes, sir.

Q. —beyond a reasonable doubt?

A. Yes, sir.

Q. If there is any reasonable doubt from the evidence, even though the defendant says nothing, he is presumed to be innocent?

A. Yes, sir.

Q. And you would give him the benefit of that doubt?

A. Yes, sir.

Q. Do you understand the law to be that if the defendant was insane at the time the act was committed to such an extent that he doesn't appreciate what he is doing or that it is wrong, that that excuses him and he shouldn't be found guilty if that is proven?

A. No, sir.

Q. Have you any prejudice against the defence of insanity?

A. No, sir.

Q. If the defence in this case were insanity, and there were evidence of that introduced, would you give it the same consideration you would evidence of any other fact that might be set up as a defence?

A. Yes, sir.

Q. If there were evidence introduced to prove the insanity of the defendant, and it should not be sufficient to convince you beyond a reasonable doubt that he was insane, but if there should be evidence enough to raise a doubt in your mind as to whether or not he was insane; in other words, if your mind were in such a state that you couldn't arrive at a conclusion or were satisfied as whether or not he was insane and there was some reasonable doubt in your mind, would you give him the benefit of the doubt and acquit him if the court should instruct you that is the law?

85

A. Yes, sir.

Q. How old did you say you were?

A. Thirty.

Q. What is your occupation—miner?

A. Yes, sir.

Q. Before coming here it was what?

A. Engineer in a logging camp in Washington.

Q. How long had you followed that business?

A. Eight years.

Q. Did you ever run on the river as an engineer?

A. No, sir.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Mr. Finley, this is a case here in which the defendant has been indicted by the grand jury which met here last winter, charging him

with murder in the first degree, the alleged crime having taken place on Chicken Creek some time about the 24th of May, 1908. And the defendant is now brought here at this time for trial—do you know anything about the case?

A. No, sir; I do not.

Q. I should have stated that he was indicted for the murder of one Gus Lawless on Chicken Creek—has any one talked to you about the case?

A. No, sir.

Q. Have you read anything about it?

A. Excepting I saw an item the other day that it was coming up.

86 Q. If it developed during the course of the trial that the defendant came from California where you were born, would that have any effect on your verdict?

A. I was'nt born in California. I was born in Georgia.

Q. How long did you live in California?

A. I was only down there four or five months.

Q. What part of Georgia did you come from, Mr. Finley?

A. The northern part.

Q. Near Atlanta?

A. About sixty-five miles north of Atlanta.

Q. You are in favor of the enforcement of law, Mr. Finley?

A. Yes, sir.

Q. During the course of your life have you ever had any difficulty where you or the other party resorted to the use of arms in the course of the difficulty?

A. No, sir; I have not.

Q. You haven't any prejudice against the Government in any way——

A. No, sir.

Q. —nor against the defendant?

A. No, sir.

Q. This being a case wherein the defendant is charged with murder in the first degree, if he were found guilty the death penalty might be inflicted. Have you any conscientious opinions which would preclude you or keep you from finding a verdict of guilty if the evidence warranted, on account of the fact that the death penalty might be inflicted?

A. No, sir.

Q. In other words, are yon opposed to capital punishment where the evidence is suffcient under the instructions of the court?

A. No, sir.

87 Q. Has Mr. Dillon been your attorney in any matter?

A. No, sir.

Q. Now, what did you understand in a case of this kind that you should try the case upon, Mr. Finley, as a juror? I don't know whether you understood the question.

A. No, sir; I don't understand the question.

Q. Do you understand that in a case of this kind, or in any criminal case, you must try the case absolutely and solely on the evidence in the case under the instructions of the court?

A. Yes, sir.

Q. You understand that the court, or the judge presiding over the court, is the one who lays down the law of the case do you?

A. Yes, sir.

Q. And you would heed whatever instructions he gave you?

A. Yes, sir.

Q. And would consider the evidence given here on the stand and none other?

A. Yes, sir.

Q. Do you think you could be an absolutely fair and impartial juror in this case, Mr. Finley?

A. Yes, sir.

Q. You have no prejudice against the Government in any way, Mr. Finley?

A. No, sir.

Q. And also I believe you said you were in favor of the enforcement of law?

A. Yes, sir.

Q. So that you could sit in the case as a juror and try the case with absolute fairness and impartiality as between the Government on the one hand and the defendant on the other?

88 A. Yes, sir.

Q. And you would do so?

A. Yes, sir.

Q. Do you know the defendant, George Matheson?

A. No, sir.

Q. Do you know his father, sitting here?

A. No, sir.

Q. Do you know any of the witnesses in the case?

A. No, sir.

(The juror is accepted.) (8)

EUGENE JOHNSON, called from special venire, and first duly sworn upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Q. You also live at Ester Creek, Mr. Johnson?

A. Yes, sir.

Q. How long have you lived in this part of Alaska?

A. This part of Alaska?

Q. Yes, sir.

A. Since January, 1903.

Q. You are a brother of Bert Johnson, are you?

A. Yes, sir.

Q. Did you ever hear of this case before?

A. I have heard of it, but I did'nt pay any attention to it.

Q. Did you read of it in the papers?
A. I don't know as I did.
Q. You heard somebody talk about it?
A. Yes, sir; today.
Q. Did you ever talk with anybody about the merits of the case, Mr. Johnson?
A. No, sir.
89 Q. Did what you heard about the case cause you to form an opinion as to the guilt or innocence of the defendant?
A. No, sir.
Q. Are you acquainted with George Matheson or his father?
A. No, sir.
Q. Are you acquainted with any of the witnesses in this case, as far as you know of?
A. No, sir; not that I know of.
Q. You have never been in the Chicken Creek country?
A. No, sir.
Q. How old are you?
A. Nearly forty-four years old.
Q. Are you a man of family?
A. No, sir.
Q. Then, of course, you are a single man?
A. Single man.
Q. Where the defence of insanity is interposed on behalf of the defendant, have you any prejudicy against such a defence?
A. Well, I don't know as I have; no, I have not.
Q. Would you give to that defence the same consideration and be governed to the same extent if it should appear the defendant was insane at the time of the commission of the act, that you would any other defence?
A. I would; yes.
Q. Would it require any more evidence or stronger or better evidence to establish that than it would any other defence?
A. I think it would.
Q. You think it would require stronger evidence?
A. Yes; much more evidence.
(Juror challenged for cause. Government does not resist. Juror excused for cause.)

90 A. P. ANFORSEN, called from special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Your name is A. P. Anthorsen?
A. Anforsen.
Q. Where do you live?
A. Ester.
Q. How long have you lived there?
A. Well, off and on for the last three years.

Q. Where did you live before coming to Ester?
A. Cleary City.
Q. Before coming to this part of Alaska, where did you live?
A. In Atlin.
Q. How long were you in Atlin?
A. Four years.
Q. Before that where did you live?
A. In Washington.
Q. How long did you live there?
A. Ten years.
Q. And before that?
A. In Dakota.
Q. And how long were you there?
A. I was raised there.
Q. You were born there?
A. No, sir; I was born in Wisconsin, and came there when I was a little boy.
Q. In what part of Wisconsin?
A. Near Madison.
Q. How old are you now?
A. Forty-five.
91 Q. What was your occupation before coming west?
A. Farming.
Q. After you arrived in Washington, what was it?
A. Carpenter.
Q. And since you came to Alaska you have been mining?
A. Mining and carpentering.
Q. Did I ask you whether you had a family—have you?
A. No, sir.
Q. Do you know the defendant George Matheson?
A. I do not.
Q. Do you know his father Bob Matheson?
A. No, sir.
Q. Give your answers a little louder, please, so the stenographer can get them; is your hearing good?
A. Well, probably not as good as some people—I admit my hearing isn't the best.
Q. You might have some difficulty in hearing witnesses who didn't speak loud and distinctly?
A. Yes, sir.
Q. Then if a witness didn't speak distinctly you would be liable not to hear a part of his evidence?
A. Yes; I think I would.
(Counsel for defendant suggests that the juror be excused from service.)

The COURT:

Can you hear ordinary conversation, Mr. Anforsen?
A. O, in ordinary talk, if a man speaks fairly loud, I am all right. I wont say my hearing is good.

Q. Your hearing has bothered you for how long?
A. Several years.
Q. Have you any doubt about your ability to hear a witness who speaks in an ordinary conversational tone if you were
92 sitting in the seat farthest back in the jury box?
A. If he spoke rapidly or not distinct, I might not catch it all, judge.

Cross-examination by Mr. CROSSLEY:

You can hear distinctly from where you are sitting now?
A. I can hear you very distinctly, but the other gentleman spoke a little faster, and I couldn't hear some words he asked.
Q. You understand that it is your right as a juror if a man doesn't speak plainly enough as a witness, or he speaks too rapidly, that you have the right to call the court's attention to it, so he will not speak so rapidly or will have to speak louder?
A. Yes.
Q. And you would know as a juror that if you were not catching all that a witness said you would have a right to have him speak louder or more slowly?
A. Yes.
Q. That is, you would speak to the court about it?
A. Yes, sir.
Q. You could hear what Mr. Dillon asked you, could you?
A. Well, there was words I couldn't quite catch, because he speaks faster.
Q. You could hear what the judge said to you a few moments ago, could you?
A. O, yes; I could hear that.
Q. Does it merely affect one ear or both?
A. Both ears are a little affected by catarrh.
Q. If you sat in one of the front chairs in the jury box
93 you could probably hear without any difficulty, could you?
A. Lots of witnesses may not speak very loud, and it might bother me in that case.
Q. Of course, you understand in a case of this kind you would want to hear all of the evidence so as to be able to determine fairly and impartially what the testimony is?
A. Certainly.
(The challenge is resisted.)
Mr. DILLON. I think we are entitled to jurors who have the full benefit of their natural hearing.
(Argument.)
The COURT: Do you feel yourself, Mr. Anfonsen, that there is some doubt about your hearing all of the testimony in the case?
A. A man speaking very fast I would probably miss it, and would probably not get it all if he didn't speak fairly loud.
(Juror excused for cause.)

SAM ASHHEIM, called from the special venire and first duly sworn on his own voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You live in Fairbanks, Mr. Ashheim?

A. Yes, sir.

Q. How long have you lived here?

A. Five years.

Q. Are you acquainted with the defendant, George Matheson?

A. No, sir.

Q. Do you know his father?

A. I don't think so; no, I don't think so.

Q. Have you ever heard about this case?

A. Well, I have read in the papers about it.

94 Q. Have you ever talked with anybody about it?

A. I don't remember.

Q. Did what you read in the papers cause you to form or express an opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. Have you any such opinion at the present time?

A. I have not.

Q. Have you any reason at all why you can't fairly and impartially try the issues in this case?

A. No, sir.

Q. Do you think you can try the case on the evidence and the instructions of the court?

A. Yes, sir.

Q. Have you any prejudice against the defence of insanity in a murder case?

A. I have not.

Q. Would you give that the same consideration you would to any other defence as made?

A. Yes.

Q. If there were evidence of insanity introduced, although not sufficient to convince you beyond a reasonable doubt as to the insanity of the defendant at the time of the commission of the act, but raised a reasonable doubt as to whether or not he was insane at the time, would you give him the benefit of that doubt?

A. I don't know.

Q. Perhaps you don't understand the question.

A. No; I don't.

Q. If there was evidence introduced to prove that the defendant was insane at the time of the commission of the act, if that evi-

95 dence was not sufficient to thoroughly convince you of his insanity, but yet enough to raise a doubt; in other words, if after hearing the evidence you were in such a state of mind that you couldn't say whether he was sane or insane—you were in doubt about the matter and not able to come to any satisfactory conclusion in your own mind as to whether he were sane or not—would you give him the benefit of the doubt and acquit him?

A. Well, I think I would.

Q. Well, are you sure you would if the court should instruct you that he is entitled to that benefit?

A. Yes; I would.

Q. Have you ever been a trial juror in a case on a charge of murder?

A. No, sir.

Q. You have been a trial juror on a good many criminal cases?

A. Yes, sir.

Q. You understand that the defendant is entitled to be proven guilty beyond a reasonable doubt before you can find a verdict against him?

A. O, yes.

Q. Have you been a trial juror during this present term of court here?

A. No, sir.

(Defendant challenges peremptorily.) (6)

THOMAS WOODSON, called from special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Q. Your name is Thomas Woodson?

A. Yes, sir.

96 Q. How long have you lived in Alaska?

A. About twelve years.

Q. Are you acquainted with the defendant?

A. Yes, sir.

Q. You know him, do you?

A. Yes, sir.

Q. Do you know his father?

A. Yes, sir.

Q. How long have you known them?

A. Since the fall and winter of 1898.

Q. What is your occupation?

A. Miner.

Q. Have you ever talked with anybody about this case?

A. Yes, sir.

Q. And have read about it?

A. Yes, sir.

Q. Did the people you talked to about it detail to you the facts of the case, or what purported to be the facts?

A. Well, the case itself is only the reading that I have seen.

Q. In the newspapers?

A. Yes; just newspaper reports; the merits of the case properly I do not know.

Q. Well, have you talked with any one who undertook to tell you about the merits of the case?

A. No.

Q. You think not?
A. No, sir.
Q. From what you have read and heard and what talk you have had about the case, have you formed any opinion as to the guilt or innocence of the defendant?
A. Well, I have formed an opinion; yes, sir.
Q. Have you that opinion now?
A. Yes, sir.
97 Q. Is that such an opinion as would take evidence to remove?
A. The opinion is such that I don't feel that I am competent as a juror in the case.
Q. You don't feel you can try the case as between the defendant and the Government in justice to both?
A. I do not. I have formed an opinion one way.
(Juror challenged for cause.)

Cross-examination by Mr. CROSSLEY:

Could you disregard that opinion or the impression that is in your mind and try the case fairly and impartially on the evidence and the instructions of the court?
A. I would certainly do that, yes; but while I say the reason I don't feel competent is knowing as much of the family and the people and all that, I don't feel I would be competent as a juror in the case. That's why I would like to be excused on that ground.
(Juror excused for cause.)

E. C. HEACOCK, called from the special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside, Mr. Heacock?
A. Fairbanks.
Q. What is your business?
A. Mining.
Q. How long have you been engaged in that business?
A. Five years, I have been.
Q. Where did you live before coming here?
98 A. Dawson.
Q. And before going to Dawson?
A. I came from California.
Q. What did you follow in California?
A. I was farming there most of the time.
Q. You have a family?
A. Yes, sir.
Q. Your family is here with you?
A. Yes, sir.
Q. How old a man are you, Mr. Heacock?
A. Forty-eight.

Q. Are you acquainted with the defendant, George Matheson?
A. No, sir.
Q. Or with his father, Bob Matheson?
A. No, sir.
Q. You will have to speak a little louder so the stenographer can get your answers. Have you ever talked with anybody about this case?
A. I think not.
Q. Have you read about it?
A. I may have read about it in the papers.
Q. Did what you read cause you to form an opinion as to the guilt or innocence of the defendant?
A. It may have at the time.
Q. Well, have you any opinion now as to whether he is guilty or not, Mr. Heacock?
A. No, sir.
Q. You feel confident of that, do you?
A. Yes.
Q. Have you ever been a juror in a criminal case before?
A. No, sir.
Q. You have in civil cases, I suppose?
A. Yes, sir.
99 Q. Have you ever been on the regular panel as a juror?
A. No, sir.
Q. How long since has it been since you have served on a jury at all?
A. O, it's twenty years, I guess.
Q. You say you have been here in this country since 1898?
A. I have been here five years, in Fairbanks.
Q. But in the north, I mean?
A. Well, in Dawson part of the time, of course.
Q. You are an American citizen?
A. Yes, sir.
Q. Your hearing is good, is it?
A. Yes, sir.
Q. Have you any prejudicy against the defence of insanity where it is interposed in a case of this kind?
A. No.
Q. Would you give that, or the evidence of that defence of the insanity of the defendant, as much credence and as much consideration as you would evidence of any other fact or defence?
A. His testimony, you mean?
Q. I say, any evidence that might be produced to establish the insanity of the defendant, would you give that evidence just as much credit and weigh it just as carefully as you would evidence as to any other defence?
A. Yes.
Q. Would it require any more evidence to establish the fact of insanity than it would any other fact?

A. I think not.

Q. If there should be evidence of insanity introduced which should not be conclusive, but was sufficient to raise a doubt in your mind as to whether or not at the time of the commission of the act the
100 defendant was sane; in other words, if, after hearing the testimony you are not able to make up your mind and you couldn't satisfy yourself whether or not he was insane, but that there was some reasonable doubt, would you give the defendant the benefit of the doubt?

A. I would.

Q. Do you know of any reason why you could not or should not sit in this case and determine the cause, or why you could not try it fairly and impartially, without bias or prejudice, on the evidence as adduced at the trial and the instructions of the court?

A. No; I don't.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

What State were you born in?

A. Iowa.

Q. In what part?

A. The eastern part, near Iowa City.

Q. What is your occupation now?

A. Mining.

Q. Where are you mining now?

A. On Treasure Creek.

Q. Where do you live at this time?

A. Here in Fairbanks.

Q. Whereabouts in Fairbanks?

A. On Fifth Avenue.

Q. Between what streets?

A. Between Cowles and Barnett.

Q. Do you know the defendant, George Matheson?

A. No, sir.

Q. You have a son, I believe, a young man?

101 A. Two of them.

Q. What do they do?

A. Well, one of them is with Palmer in the warehouse and the other one is in San Francisco at present.

Q. Do you know whether they are acquainted with the defendant, Mr. Heacock?

A. No; I am certain they are not.

Q. Did you know the defendant's father, Robert Matheson, in Dawson?

A. I don't remember.

Q. Were you ever down the Fortymile in the Chicken Creek country?

A. No, sir.

Q. Do you know any of the witnesses who are to testify in this case?

A. I don't think so.

Q. Did any of them ever talk to you about the case?

A. No, sir.

Q. Has anyone claiming to know the facts ever talked to you about it?

A. No, sir.

Q. Have you any opinion at the present time as to the guilt or innocence of the defendant?

A. No.

Q. Have you ever had an impression created in your mind by what you read as to whether he is guilty or innocent?

A. I may have had at the time I read the papers.

Q. Do you still have such opinion?

A. No; I don't remember practically anything about it.

Q. You heard my statement as to what the case was a while ago?

A. Yes, sir.

Q. Did that statement refresh your memory sufficiently so that you would remember what you read about it?

102 A. I don't think so.

Q. Did you recall at that time any opinion you may have had at the time of reading about the case?

A. No.

Q. It doesn't recall anything?

A. No; they are all strangers to me.

Q. You really don't know whether any one was killed up there at Chicken Creek or not?

A. Only by the papers, of course.

Q. Have you any conscientious opinions against the infliction of the death penalty?

A. Yes; I don't believe in capital punishment.

Q. So that although the evidence adduced on the trial of the case under the instructions of the court would be sufficient to find the defendant guilty, you would have conscientious scruples against any such verdict when the punishment might be death?

A. I would.

(Juror challenged for cause. Juror excused for cause.)

JAMES LAVIN, called from the special venire, and being first duly sworn to answer on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside, Mr. Lavin?

A. At Hot Springs.

Q. How long have you lived there?

A. Two years.

Q. What is your occupation?

A. Miner.

Q. Where are you mining now?

A. I'm not mining just at present.

103 Q. What are you doing at present?

A. I am just up here looking around for something.

Q. When were you last engaged in mining?

A. I was prospecting a little this summer.

Q. Have you been engaged in anything else?

A. Running a road-house.

Q. Where?

A. Hot Springs Plateau.

Q. How far is that from Hot Springs?

A. Twelve miles.

Q. Have you a bar in connection with it?

A. No, sir.

Q. How long since you came here?

A. One month ago yesterday, the 5th.

Q. A month ago—have you a family?

A. Yes, sir.

Q. Here in Alaska?

A. Yes, sir.

Q. Where; down at Hot Springs?

A. Yes, sir.

Q. How old are you, Mr. Lavin?

A. Forty-five.

Q. Have you ever talked to anybody about this case?

A. I spoke to some man that came up on the boat; he said they was witnesses in the case.

Q. Did they say anything about the facts of the case?

A. No, sir.

Q. Didn't talk about the merits of the case or detail them to you at all?

A. No, sir.

Q. Where did you live before coming to Alaska?

A. Dawson.

Q. And where before that?

104 A. California.

Q. That is your native State?

A. Yes, sir.

Q. What was your occupation in California?

A. Running a livery stable.

Q. What?

A. Livery business.

Q. What was your business in Dawson?

A. Mining.

Q. How long were you in the livery business in California?

A. Eight or ten years.

Q. You quit that to come into the Dawson country?

A. No; I quit pattern-making in San Francisco—quit working at the pattern business.

Q. You are a pattern-maker by trade?

A. No, sir; but I was working at it.

Q. How long?

A. About a year.

Q. Have you any prejudicy against the defence of insanity where it is interposed in cases of this kind?

A. I have often expressed my opinion of it a great many times, about men who make that plea.

Q. We are not talking about the plea; but where a person is insane, do you think they should be punished for crime?

A. No, sir.

Q. Do you believe insanity, if it really exists, ought to be allowed as a defence to crime?

A. If it really exists; yes, sir.

Q. Would it take any more evidence to established that fact in your mind than any other fact of the defence?

A. Well, I think it would—unless he could prove he was insane.

Q. You think you have such a feeling against it that it
105 would have to be pretty thoroughly proved?

A. Yes, sir.

Q. If there were evidence of insanity introduced which was not conclusive as far as you were concerned, but it left you in doubt as to whether or not the defendant was insane—in other words, if after having heard the testimony you couldn't make up your mind whether he was insane or not insane, would you give him the benefit of the doubt and acquit him, or would you have to be shown beyond all reasonable doubt that he was insane?

A. Yes, sir.

Q. You would have to?

A. Yes, sir.

Q. Even though the court might instruct you that if there was a doubt of insanity that would be sufficient—if there was a reasonable doubt of his insanity that would be sufficient—a reasonable doubt?

A. If the court instructs me so, I would give him the benefit of it.

Q. But still, the feeling you have against the defence of insanity as a defence is such that you would require stronger testimony to prove that than almost any other defence a man might introduce?

A. Yes, sir.

(Defendant challenges for cause. Government resists.)

Cross examination by Mr. CROSSLEY:

You would follow the instructions of the court, would you not, as to what evidence would be sufficient to acquit; would you not, Mr. Lavin?

A. Yes, sir.

Q. And if the court instructs you that it is the duty of the
106 Government to prove the guilt of the defendant beyond a reasonable doubt, and even so far as to put the burden on the Government of proving the defendant sane, you would follow the instructions of the court, would you not?

A. Yes, sir.

Q. So that although you may have felt that this plea of insanity in murder cases had been interposed frequently where there was no sufficient ground for it, still if you sat as a juror in such a case you would consider all of the evidence in the case as to his sanity or insanity under all of the evidence in the case and return your verdict accordingly, would you not?

A. Yes, sir.

Q. You would require the Government, would you, to prove beyond a reasonable doubt that the defendant was guilty before you would return a verdict to that effect?

A. Yes, sir.

Q. You haven't any prejudice for or against the Government or the defendant in this case?

A. No, sir.

The COURT:

Now, Mr. Lavin, you have—I understood you to say you have no such prejudice against the defence of insanity or any other defence as to prevent you from trying the case fairly and impartially and resolving every reasonable doubt in favor of the defendant?

A. Yes; I would give him the benefit of the doubt.

Q. Every reasonable doubt. And if called as a juror in this case you could do so and would do so?

A. Yes, sir.

Q. And you would consider, no matter what defence might be offered, all the testimony in support of that defence whether it
107 was insanity or any other defence, and if it raised a reasonable doubt in your mind as to the guilt of the defendant you would resolve that doubt in his favor and acquit him?

A. Yes, sir.

The COURT. I think the juror is qualified.

(Exception.)

(Defendant challenges peremptorily.) (7)

ALEX MCEWAN, called from special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside, Mr. McEwan?

A. Fairbanks?

Q. How long have you lived here?

A. About two months.

Q. Where did you live before that?

A. On the creeks.

Q. How long have you lived in this part of Alaska?

A. Five years this fall.

Q. Where did you come from?

A. Nome.

Q. Where did you come from to Nome?

A. California.
Q. Is that your native State?
A. No, sir.
Q. Where were you born?
A. In the State of Michigan.
Q. How long did you live there?
A. I left there when I was twelve years old.
Q. What was your occupation at that time, or your parents?
A. My father was a farmer.
Q. Where did you move from Michigan?
108 A. To Oregon from there.
Q. How long did you remain in Oregon?
A. I guess about seven or eight years.
Q. What occupation did you follow there?
A. Well, different occupations—mining, teaming, and different things.
Q. From Oregon where did you go?
A. To California.
Q. What did you follow there?
A. Well, I was doing a transfer business there most of the time.
Q. Teamster?
A. Yes, sir.
Q. From California where did you go?
A. To Alaska.
Q. What business have you followed since coming to Alaska?
A. Mining and teaming.
Q. Your principal occupation during your lifetime has been that of a teamster in some form?
A. Well, yes; I guess it might be teamster and mining together.
Q. Have you a family?
A. I have a wife.
Q. Here?
A. Yes, sir.
Q. How old are you?
A. I will be forty-three years old this month.
Q. Are you acquainted with the defendant?
A. No, sir; I am not.
Q. Have you ever read the papers about this case?
A. I have read sketches about it—don't remember of having read much about it.
Q. Have you talked with anybody about the case?
A. No.
Q. From what you read have you formed or expressed an
109 opinion as to the guilt or innocence of the defendant?
A. No; I did not.
Q. And you have no such an opinion now?
A. I have not.
Q. Do you know of any reason yourself—are you conscious of any reason why you couldn't be a fair and impartial juror in this case?

A. No; I dont know of any reason.

Q. If the defence of insanity were set up by the defendant have you any prejudicy against that as a defence in cases of this kind?

A. No; not where it is established that it is a case of insanity.

Q. If that were established to exist at the time of the commission of the act——

A. Yes.

Q. —or as alleged to have been committed, that the defendant was insane, you would if the court should instruct you that would excuse him from the penalty of his crime, you would act accordingly?

A. I certainly would.

Q. Would it take any more evidence to establish that fact in your mind that any other defence—in other words, have you such a feeling against that as a defence that you couldn't give the evidence of it the same credence and the same weight you could some other defence, such as self-defence?

A. I think not in that way. Of course I think any evidence in a case ought to have the same weight.

Q. Do you think it would require any more evidence to establish the fact of insanity than any other?

A. No, sir; I don't think so.

110 Q. If there were evidence of insanity, although not enough to convince you that the man was insane, but which did leave you in doubt as to whether he was or not; in other words, to leave your mind in such a state that you couldn't say you were satisfied that he was insane, would you give him the benefit of that doubt in arriving at your verdict?

A. Yes, sir; I would.

(Defendant challenges peremptorily.) (8)

Adjournment until tomorrow.

FAIRBANKS, *September 8, 1909—10 a. m.*

GEORGE FORD, called from special venire, being first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside, Mr. Ford?

A. Chatanika.

Q. How long have you resided in Alaska?

A. Four years.

Q. How long at Chatanika?

A. I have been on Cleary Creek most of the time.

Q. What is your occupation?

A. Mining.

Q. Any other occupation?

A. Mining and driving a team.

Q. What is your age?

A. Thirty-two.

Q. You have sat on a jury in criminal cases I suppose?
A. No, sir.
Q. Are you married or single?
A. Single.
Q. Where were you born?
111 A. In New York.
Q. How long did you remain there; until you were of age?
A. Yes, sir; there and Pennsylvania.
Q. What was your occupation there?
A. I worked around the factories and in the woods—that line of work.
Q. You are a laborer?
A. Yes, sir.
Q. Have you heard or read about this case?
A. Yes, sir.
Q. Have you talked with anybody about it?
A. Well, a fellow I was working with was reading about it in the paper.
Q. Have you ever talked with anybody who purported to know the facts of the case?
A. I don't think I ever did.
Q. Did you, from what you read and heard, form an opinion as to the guilt or innocence of the defendant?
A. I did at the time; yes, sir.
Q. Have you that opinion yet?
A. Well, I think I have some; yes, sir.
Q. Is that a fixed opinion?
A. Well, no; I can't say that I have.
Q. Do you have such an opinion as would require evidence to change?
A. Well, I think it would require a little evidence; yes, sir.
(Defendant challenges for cause. No resistance. Excused for cause.)

MAX YAGERMAN, called from special venire and first duly sworn to answer on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you live, Mr. Yagerman?
112 A. Sir?
Q. Where do you live?
A. On Ester Creek.
Q. How long have you lived there?
A. About one and a half years.
Q. Where were you born?
A. Michigan.
Q. How long did you live there?
A. Well, I lived there about twenty-two or twenty-three years.
Q. What was your occupation?

A. Farmer.
Q. How old are you?
A. Thirty-three.
Q. How long have you been in Alaska?
A. About one and a half years.
Q. You have been mining since you have been here?
A. Yes, sir.
Q. Since you left Michigan and before you came to Alaska, where did you live?
A. I was in the U. S. Army.
Q. How long?
A. Pretty nearly twelve years.
Q. Did you serve during the Spanish-American War?
A. Yes, sir.
Q. Where?
A. In Cuba.
Q. And you were in the service up until the time you——
A. No, sir.
Q. Where were you discharged?
A. Fort Thomas, Kentucky.
Q. And when was that?
A. In December, 1905.
113 Q. Then you came to Alaska soon after that?
A. Well, I came to Alaska a year ago last fall.
Q. After being discharged and before you came to Alaska, what was your occupation?
A. Farmer.
Q. Are you a married man?
A. No, sir.
Q. Have you ever been a juror before in a criminal case?
A. No, sir.
Q. Have you ever had any trouble of this kind?
A. No, sir.
Q. That is, directly or indirectly in a criminal case or prosecution?
A. No, sir.
Q. Have you ever talked about this case with anybody?
A. No, sir.
Q. Have you read about it?
A. Well, that is outside of what I read.
Q. You have read about it in the newspapers from time to time?
A. Yes, sir.
Q. Did what you read cause you to form any opinion as to the guilt or innocence of the defendant?
A. Well, not that I know of; just newspaper articles, and they are not always reliable.
Q. Have you any opinion now as to whether the defendant is guilty or innocent of the charge?
A. No, sir.

Q. Do you know of any reason why you cannot fairly and impartially try the case and render a verdict according to the law and the evidence?

A. No, sir.

Q. You say you have never been a juror before in a criminal case?

114 A. No, sir.

Q. Have you any prejudicy against the defence of insanity where it is interposed as a defence to murder?

A. Well, no; not that I know of.

Q. What is that?

A. No, sir; I don't think I have.

Q. You believe that a man who is insane should be excused—that he is not responsible for what he does?

A. If it is proven that he was insane; yes.

Q. Would it take any more evidence to prove the fact of insanity than it would any other defence so far as you are concerned?

A. Why, I think it would.

Q. You think it would require more evidence?

A. Yes, sir.

Q. Think it would require very much more?

A. I think so; yes, sir.

Q. If the evidence offered to prove the insanity of the defendant at the time of the commission of the act were such as to raise in your mind a doubt as to whether or not he was insane at the time of the act, would you give him the benefit of that doubt if the court instructs you that that is the law, or would you have to be shown beyond a reasonable doubt that he was insane?

A. I think I would.

(Defendant challenges for cause. The Government resists.)

Cross-examination by Mr. CROSSLEY:

I hardly think you understand the situation, Mr. Yagerman. Whatever the instructions the court might give as to the

115 amount of evidence necessary to establish the guilt of the defendant, you would follow them, would you?

A. Yes, sir; I would.

Q. You understand that it is the duty of the jury to hear and weigh the evidence, and to take their instructions from the court as to the law?

A. It depends on what evidence was given.

Q. Yes; but it is the province of the jury to consider the evidence under the instructions of the court, and the court gives the jury the law?

A. Yes; I understand that all right.

Q. So if the court should instruct you that in rendering your decision you were to consider whether the defendant was insane at the time the offence was committed, and that if the evidence should show that he should be acquitted, would you do that under the instructions of the court?

A. If it was proven that he was insane at the time of the act I would; yes.

Q. So if you had a reasonable doubt as to whether he was insane at the time the offence was committed, you would acquit him?

A. I don't quite catch that.

Q. I say if you had a reasonable doubt, after hearing the evidence, as to whether the defendant was insane at the time he committed the act charged against him, or whether he was of sound mind at that time, you would acquit him under the instructions of the court?

A. Well, I would; but it depends of course—some people would form an opinion in regards to a reasonable doubt differently than others would. It depends on what evidence was given. I would have to have pretty good evidence that he was insane before I would form an opinion on it.

116 Q. But whatever the court's instructions were as to that matter, you would follow his instructions as a juror?

A. I would, to the best of my ability.

Redirect examination by Mr. DILLON:

But it would take strong and convincing evidence to even raise a doubt as to insanity in your mind?

A. Well, it would take pretty good evidence anyway.

(Challenge renewed.)

The COURT. Mr. Yagerman, it is the province of the jury, and a juror has the right to determine, whether or not the evidence raises in his mind a reasonable doubt as to the defendant's guilt, under the instructions of the court. The court will define to you what a reasonable doubt is, and under those instructions each juror will determine for himself whether or not the evidences raises a reasonable doubt. Now, if the court were to instruct you that you are to give the defendant the benefit of every reasonable doubt, and if the defence of insanity is interposed here as a defence, and if the proofs submitted in support of that defence should raise in your mind what the court will define as a reasonable doubt as to the responsibility of the defence, and therefore as to his guilt, would you resolve that doubt in his favor and acquit him?

A. Yes, sir; I think I would.

By Mr. DILLON. If the court please, I feel this way in this matter: While I think that this man would give the defendant the benefit of the doubt, I think he would require, under his own statement, a class or degree of proof not required by the law; that is, he would

117 require more evidence to prove the fact of insanity than any other fact.

The COURT. Nevertheless, he says that if it did raise a reasonable doubt as to the responsibility of the defendant, he would give him the benefit of that doubt. Of course, Mr. Dillon, it may take more evidence to raise a reasonable doubt in one juror's mind than in the mind of another; but if he says he will follow the instructions of the court as to what is a reasonable doubt and be guided by the evidence,

and then, if such reasonable doubt exists, he will give the defendant the benefit of such doubt, I think he is competent, and the challenge is denied.

(Exception.)

(Defendant challenges peremptorily.) (9)

EUGENE FENTON, called from special venire and first duly sworn to answer on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside?

A. Fairbanks.

Q. How long have you lived here?

A. About a year.

Q. What is your occupation?

A. Civil engineer and surveyor.

Q. Where did you come from to this place?

A. Steel Creek, in the Fortymile district.

Q. I mean to Alaska?

A. From Seattle.

Q. Where were you born?

A. Union, Missouri.

Q. How long did you reside there?

A. Sixteen years.

118 Q. Where were you educated as an engineer?

A. At the University of Washington.

Q. Did you ever follow anything in Washington except your studies as a student?

A. No, sir.

Q. What is your parents' occupation?

A. My father is a minister.

Q. Have you ever worked at anything else except your profession?

A. In 1898 I was in the Volunteer Army.

Q. How long?

A. About a year and a half.

Q. Where?

A. In the Philippine Islands.

Q. Where were you discharged?

A. At San Francisco.

Q. What is your age now?

A. Thirty-one.

Q. Are you married or single?

A. Single.

Q. Have you ever been a juror before?

A. No, sir.

Q. This is your first experience?

A. Yes, sir; if I sit in this case.

Q. Have you heard or read anything about this case?

A. Yes, sir.

Q. Have you talked with anybody about it?

A. Yes, sir.

Q. From what you read or heard have you formed an opinion as to the guilt or innocence of the defendant?

A. Yes, sir.

Q. Have you that opinion now?

A. Yes, sir.

(Deft. challenges for cause. Excused for cause.)

119 GUS MURRAY, called from special venire and first duly sworn to answer on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside Mr. Murray?

A. Graehl.

Q. How long have you lived there?

A. Three years.

Q. What is your occupation?

A. Logger.

Q. How long have you followed that business?

A. Three years.

Q. Where were you born?

A. Oregon.

Q. How old are you?

A. Thirty-eight.

Q. How long did you live in Oregon?

A. Six weeks.

Q. Where did you live the balance of your life?

A. In Washington.

Q. What was your occupation there?

A. Logging, steamboating, and fishing.

Q. Did you follow that until you came to Alaska?

A. Yes, sir.

Q. And have you been mining some since that?

A. Yes, sir.

Q. How long have you lived in Alaska?

A. I came to Dawson in 1898 and then went to Nome in 1899.

Q. And you have been in Alaska ever since?

A. Yes, sir; of course I have been outside back and forth since.

Q. Well, this has been your home?

A. Yes, sir.

120 Q. How old did I understand you are?

A. Thirty-eight.

Q. Have you ever been a juror in a criminal case?

A. No, sir.

Q. Have you ever been interested in a criminal prosecution of this kind?

A. No, sir.

Q. You have never been arrested yourself?

A. No, sir.

Q. Have you read about this case?

A. Yes, sir.
Q. Have you ever talked with anybody about it?
A. Yes, sir.
Q. From what you read and what you heard about it have you formed an opinion as to the guilt or innocence of the defendant?
A. Yes, sir.
Q. Have you that opinion now?
A. Yes, sir.
(Defendant challenges for cause. The Government resists.)

Cross-examination by Mr. CROSSLEY:

Is that such an opinion, Mr. Murray, that you could not entirely disregard it and try this case on the evidence and the instructions of the court?
A. How is that again.
Q. Could you entirely disregard the opinion you now have and try the case absolutely on the evidence adduced and the instructions of the court?
A. I think I could.
Q. And would you do that?
A. Well, I couldn't say until I heard the evidence.
121 Q. Well, I asked you if you could disregard the opinion you now have?
A. I couldn't answer until I hear the evidence.
Q. Then you wouldn't disregard the opinion you now have and try the case just as if you never had an opinion?
A. No; I couldn't say until I heard the evidence.
(Juror excused for cause.)

A. B. FERGUSON, called from special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You reside in Fairbanks, Mr. Ferguson?
A. Yes, sir.
Q. Are you a married man?
A. Yes, sir.
Q. How old are you?
A. Forty-four.
Q. Where were you born?
A. Tennessee.
Q. What is your occupation?
A. Miner.
Q. What was your occupation before coming to Alaska?
A. Travelling man.
Q. Travelling salesman. Have you read and talked about this case at all?
A. No; I never heard of it until yesterday.
Q. Are you acquainted with the parties?
A. No, sir.

Q. Have you any opinion now as to the guilt or innocence of the defendant?

A. No.

Q. Do you know of any reason why you couldn't act fairly
122 and impartially as a juror and try this case?

A. I do not.

Q. Have you any prejudicy against the defence of insanity where it is interposed as a defence in a case of this kind?

A. No.

Q. If there were evidence of insanity offered, although not conclusive, but such as would raise in your mind a reasonable doubt as to whether or not the defendant was guilty—was sane at the time of the commission of the act, and the court should instruct you that that was sufficient to raise a reasonable doubt of his guilt, would you give him the benefit of that doubt?

A. I would.

Q. Would it require any more evidence to establish the defence of insanity—any stronger or better evidence, than it would any other defence?

A. No.

Q. Do you know of any reason why you couldn't fairly and impartially try this case?

A. None that I know of now.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Has Mr. Dillon ever been your attorney in any matter, Mr. Ferguson?

A. Never; no, sir.

Q. Do you know any of the parties to this case—the defendant or his father, Robert Matheson?

A. No, sir.

Q. Did you ever live in the Fortymile?

A. No, sir.

123 Q. Have you ever been through there?

A. I was in the town of Fortymile in 1898 and 1899.

Q. Do you know any of the witnesses in this case?

A. No, sir.

Q. Has anyone ever talked to you about it?

A. No, sir.

Q. You read something about it?

A. I saw in the papers yesterday morning that the case was to be called.

Q. That's the first time you saw anything about it?

A. Yes, sir.

Q. Have you any opinion or impression at this time as to the guilt or innocence of the defendant?

A. None whatever.

Q. In cases of this kind, where the penalty if the defendant is found guilty, can be death, do you have such conscientious opinions

as would preclude you or keep you from finding the defendant guilty if the evidence warranted?

A. No, sir.

Q. You are not opposed to capital punishment then?

A. No, sir.

Q. If the evidence warranted the finding of the defendant guilty under the instructions of the court you would find him guilty even though the penalty might be death?

A. I would.

(United States challenges peremptorily.) (1)

CHARLES SNIPES, called from special venire and first duly sworn to answer upon his voirdire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you live, Mr. Snipes?

124 A. Nothing at all at present.

Q. I asked you where you live?

A. O—Fairbanks.

Q. How long have you lived here?

A. Since July.

Q. Where were you born?

A. Oregon.

Q. You grew up there, did you?

A. I was there nineteen years in Oregon; yes, sir.

Q. What was your occupation?

A. The stock business.

Q. And from there where did you go?

A. To Washington.

Q. And what was your business there?

A. Stock business.

Q. How long did you remain there?

A. Up until last May.

Q. And then you came to Alaska; have you had any occupation since coming here?

A. None at all; no, sir.

Q. Are you married or single?

A. Married.

Q. Have you a family here?

A. Yes, sir.

Q. Have you heard or read about this case?

A. I read in the paper day before yesterday about it.

Q. Did you read an account as to what some of the evidence would be?

A. No; I don't think there was any evidence in it.

Q. Did you ever talk to anybody about the case?

A. No, sir.

Q. From what you saw in the paper did you form an opinion as to the guilt or innocence of the defendant?

A. No, sir.

125 Q. Have you any such opinion now?

A. No, sir.

Q. Where the defence of insanity is made or offered in a case of this kind have you any prejudice against such defence?

A. No, sir.

Q. Do you believe the insane should be so far excused, if they are insane as to not know the consequences of their acts?

A. Yes, sir.

Q. Would it require any more or greater or better evidence to prove insanity than it would any other defence?

A. Yes; I believe it would.

Q. You think you would have to have better proofs?

A. Yes, sir.

Q. Then you have some feeling against the defence of insanity?

A. Not at all; no, sir.

Q. Then why would you require stronger evidence of that than any other defence?

A. Well, it would have to be shown that he was insane.

Q. Well, you would have to be shown that he was justified in any other defence?

A. Yes, sir.

Q. Why require any stronger evidence of insanity as a defence than self-defence, we will say—you have to be satisfied of that too?

A. Yes, sir.

Q. And yet you would require more evidence as to insanity than any other defence?

A. Yes, sir.

Q. If evidence of insanity were offered which wasn't conclu-
sove as far as your judgment was concerned, but raised
126 a reasonable doubt as to whether or not he was sane at the time of the commission of the act, and the court should instruct you that such a doubt was sufficient to raise a reasonable doubt of his guilt, would you give the defendant the benefit of that doubt?

A. Yes, sir.

Q. Even though not entirely satisfied whether he was insane or not, you would give him the benefit of the doubt?

A. Yes, sir?

Q. Yet you think it would take more evidence to sustain that defence than any other?

A. I believe it would; yes, sir.

(Juror challenged for cause. No resistance. Excused for cause.)

W. W. PERRY, called from special venire and first duly sworn to answer upon his voir dire, testified as follows:

Direct examination by Mr. DILLON:

Where do you reside?

A. Fairbanks.

Q. How long have you lived here?
A. Close to five years.
Q. Where were you born?
A. In Rhea, Nevada.
Q. Did you grow up there?
A. Yes; there and in California.
Q. What is your occupation?
A. Various occupations.
Q. Have you a trade?
A. Three trades; yes, sir.
Q. What are they?
127 A. Plumbing and machinist and also bar-tender.
Q. How long have you been a bar-tender?
A. Three years, here and outside both.
Q. How old are you?
A. Close to forty.
Q. Have you been a trial juror in a criminal case?
A. No; but I have been in quote a number of coroner's juries.
Q. Have you had any trouble of this kind, or been interested in it in any way?
A. No, sir.
Q. Have you ever read about this case?
A. I have never read about it; I have heard people talk about it, though.
Q. Did the conversations you had cause you to form an opinion as to the guilt or innocence of the defendant?
A. No, sir.
Q. Have you any such opinion now?
A. No, sir.
Q. Have you any prejudice against the defence of insanity?
A. I don't pay no attention to insanity.
Q. You don't believe in that as a defence?
A. No, sir; unless he is a raving maniac or something like that.
(Defendants challenges for cause. No resistance. Excused for cause.)

J. A. McFarland, called from special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. Dillon:

Where do you reside, Mr. McFarland?
A. Fairbanks.
Q. Where were you born?
128 A. Ontario.
Q. Are you a citizen of the United States?
A. Yes, sir.
Q. How long since you came to America?
A. Twenty-four years.
Q. How old are you now?

A. Forty-five.
Q. Where did you live in the States before coming here?
A. California and Michigan.
Q. What did you follow in Michigan?
A. O, different occupations.
Q. Laborer principally?
A. Yes, sir.
Q. In California did you have any special occupation?
A. Yes, sir.
Q. What were you there?
A. Grain and lumber man.
Q. How long have you been in Alaska?
A. Ten years.
Q. What have you followed here?
A. Mining.
Q. Have you talked with anybody about this case?
A. No, sir.
Q. Have you read anything about it?
A. No, sir.
Q. You have no opinion, then, at the present time, as to the guilt or innocence of the defendant?
A. No, sir; I have not.
Q. Have you any prejudicy against the defence of insanity where it is interposed in a case of this kind?
A. A little; yes.
Q. You don't believe in it, as a rule, as a defence?
A. No, sir; it's got to be shown pretty clear.
129 (Juror challenged for cause. Government resists the challenge.)

Cross-examination by Mr. CROSSLEY:

You would listen to the evidence in the case and return your verdict according to the evidence and the law as it is given by the court?
A. I would do that; yes, sir.
Q. And if the court should instruct you that the plea of insanity at the time the act was committed was a defence, and the evidence on that matter raised a reasonable doubt in your mind as to the guilt of the defendant, if the court so instructed, you would return a verdict of acquittal, would you?
A. Yes, sir; I would.
Q. So that even though you have answered Mr. Dillon as you have, nevertheless if selected as a juror you would consider the evidence, and if it was shown that the defendant was not of sound mind or was insane at the time of the commission of the act, under the instructions of the court you would find him not guilty?
A. Yes, sir.
Q. Or, if the evidence raised a reasonable doubt in your mind under the instructions of the court, you would return a verdict of acquittal, would you not?
A. I think I would; yes, sir.

Redirect examination by Mr. DILLON:

Would it require more evidence to prove that defence than it would any other defence?

A. Well, it would require evidence to change me from thinking that every man is insane that kills another man.

Q. That isn't the question. The question is, if there was
130 evidence of insanity, have you any prejudice against insanity where it exists as a defence?

A. Well, a little; yes, sir.

Q. Even though insanity exists?

A. If insanity exists, why, I would have to acquit a man in a case like that.

Q. Yet you feel whenever it is interposed as a defence it is a sort of a sham defence?

A. That's the way it looks to me; yes, sir.

Q. You wouldn't entertain that with the same open mind you would some other defence?

A. I might be a little biased against insanity as a defence.

Q. And would it require stronger and better evidence to convince you of the fact of insanity than any other defence?

A. The chances are it would.

Q. You're sure of that, are you?

A. No, sir.

(Challenge renewed.)

The COURT:

Mr. McFarland, is the feeling or prejudice you say you have against insanity as a defence such as to preclude you from giving the defendant the benefit of a reasonable doubt, as it will be defined to you by the court?

A. Well, it might; although I would try to obey the instructions of the court. I might be a little biased.

Q. Do you think there is any likelihood of the prejudice you have against the defence of insanity preventing you from resolving any reasonable doubt in favor of the defendant?

A. O, if there was any doubt in my mind, I would give the defendant the advantage of it.

Q. If there was a reasonable doubt in your mind as to his
131 mental responsibility, and the court should instruct you that you should give him the benefit of the doubt, could you and would you give him the benefit of that doubt in this case?

A. Yes, sir; I think I would.

Q. You say you have a little prejudice against the defence of insanity. Is that because you believe it is interposed sometimes as a sham defence—is that the reason?

A. Yes, sir; that's the reason.

Q. But you have no prejudice against a bona fide defence of insanity?

A. No, sir.

The COURT. The challenge is denied.
(Exception.)
(Defendant challenges peremptorily.) (10)

W. H. GORHAM, called from the special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You reside here in Fairbanks?
A. Yes, sir.
Q. How long have you lived in Alaska?
A. About eleven years.
Q. You are a jeweler by trade?
A. Yes, sir.
Q. You have followed mining some since you have been here?
A. Yes, sir.
Q. Have you read or heard of this case at all?
A. Not until here lately.
Q. Well, did you read or hear about it then?
A. No; just talked about it.
Q. Did you talk very much about it?
132 A. Not to amount to anything; no, sir.
Q. Did the conversation cause you to form or express an opinion as to the guilt or innocence of the defendant?
A. No, sir.
Q. Where were you born?
A. Illinois.
Q. How old are you?
A. Thirty-nine.
Q. How long have you been in the jewelry business?
A. Every since I was thirteen.
Q. That's been your life occupation?
A. Yes, sir.
Q. Have you ever had any trouble like this yourself?
A. No, sir.
Q. Have you any prejudice against the defence of insanity, where it is interposed on behalf of a defendant?
A. Yes; I think I have.
Q. Does that amount to enough so it would require more evidence as to insanity than it would in any other defence that might be made, before you would allow it as a defence?
A. Yes; I believe it would.
Q. Your mind is not open and free to give it the same consideration you would to any other defence?
A. No, sir; I couldn't do that.
(Defendant challenges for cause. The Government resists.)

Cross-examination by Mr. CROSSLEY:

You could consider the evidence submitted on the matter of insanity and decide that matter under the instructions of the court, could you, Mr. Gorham?

A. Well, in case of deciding that way I would want him locked up.

133 Q. That is, if he was to be excused from the commission of the crime on that ground?

A. Yes, sir.

Q. If the statute should provide that that could be done in the discretion of the court; then, if such defence was interposed and you found the evidence was sufficient to raise a reasonable doubt in your mind, you would be in favor of a verdict of acquittal, would you not?

A. I don't think I would.

Q. You think, then, that you are so prejudiced against the plea of insanity as a defence in a case of this kind that you couldn't be a fair and impartial juror?

A. No; I could not.

(Juror excused for cause.)

L. A. FREESTONE, called from special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside?

A. Fairbanks.

Q. How long have you lived here?

A. Five years.

Q. What is your occupation?

A. Mining.

Q. Where have you been mining?

A. In the Bonnifield country all this last summer.

Q. Are you married or not?

A. Married.

Q. Is your family here?

A. Yes, sir.

Q. How old are you?

134 A. Thirty-eight.

Q. Where were you born?

A. New York.

Q. Did you grow up there?

A. I was there until I was nineteen.

Q. What did you follow as a living there?

A. Farming.

Q. Then where did you go?

A. Colorado.

Q. What did you follow there?

A. Mining, working in the quartz mills.

Q. Since coming north you have been engaged principally in mining, have you?

A. Yes, sir; placer mining.

Q. Have you ever been a juror in a criminal case?

A. Yes, sir.

Q. At this term of court?
A. Yes, sir.
Q. What jury were you on?
A. On the Robert Dunn jury?
Q. Have you talked to anybody about this case?
A. No, sir.
Q. Have you read about it?
A. I did at the time—read about it.
Q. Well, you remember that there was such a case?
A. Yes, sir.
Q. Have you any opinion as to the guilt or innocence of the defendant?
A. I have not.
Q. Have you any prejudice against the defence of insanity when interposed in a case of this kind?
A. I can't say I have.
Q. You can give it the same consideration you would any
135 other defence?
A. Yes, sir.
Q. Your mind is just as open to receive the evidence of insanity as of any other defence?
A. Yes, sir.
Q. And you would give it the same consideration?
A. Yes, sir.
Q. If evidence were introduced which raised in your mind a doubt as to whether or not the defendant was insane or not at the time of the commission of the act; in other words, if your mind were in such a state at the conclusion of the evidence that you could come to no conclusion or had a reasonable doubt as to whether or not he was insane, and the court should instruct you that such a doubt were sufficient to raise a reasonable doubt as to the guilt of the defendant, would you give him the benefit of the doubt based on that ground?
A. Yes, sir.
(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Q. Are you acquainted with Mr. Dillon?
A. Just slightly.
Q. You don't know the defendant?
A. No, sir.
Q. Do you know his father, Robert Matheson?
A. No, sir.
Q. You came direct to Fairbanks from southeastern Alaska?
A. Yes, sir.
Q. You never had any trouble in life yourself of this kind, where any force of arms had been used or anything?
A. No, sir.
136 Q. You haven't an opinion as to the guilt or innocence of the defendant, have you, Mr. Freestone?

A. No; I have not, Mr. Crossley.
Q. You merely read something about it at the time?
A. Yes; but I have forgotten the circumstances entirely.
Q. So you could enter upon the trial of the case as a fair and impartial juror?
A. Yes, sir.
Q. And if selected you would act as such?
A. I would try to.
Q. And try the case solely on the evidence adduced here at the trial under the instructions of the court?
A. Yes, sir.
Q. In a case of this kind, Mr. Freestone, if the defendant should be found guilty of the crime charged the penalty might be death. Would that prevent you from returning a verdict of guilty in the case if the evidence were sufficient under the instructions of the court?
A. No, sir.
Q. That is, you have no conscientious opinions against it that would prevent you from returning such a verdict if the evidence warranted it?
A. No, sir.
(The juror is accepted.) (9.)

J. R. STONE, called from the special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside, Mr. Stone?
A. Ester Creek.
137 Q. How long have you lived there?
A. About a year.
Q. What is your occupation?
A. Mining.
Q. You are working for wages there, are you?
A. Yes, sir.
Q. Who are you working for?
A. McRae and Holtz.
Q. Are you a single man?
A. Yes, sir.
Q. Do you work steadily right along?
A. Yes, sir.
Q. Where were you born?
A. Sweden.
Q. How long did you live there?
A. About eight years.
Q. Then you came to where?
A. To Minnesota.
Q. How long did you live there?
A. About sixteen years.

Q. What was your occupation while there?
A. Farming.
Q. Then where did you go?
A. Went to Oregon.
Q. And how long were you in Oregon?
A. Two years.
Q. What did you do there?
A. Sawmilling.
Q. Then where did you go?
A. Washington.
Q. And how long were you there?
A. I was in Washington about four years.
Q. And what did you do while in Washington?
A. I was carpentering, sawmilling, and working in the woods.
Q. And then where did you go?
A. Came to Alaska.
Q. And you have been here ever since coming to Alaska?
A. Yes, sir.
Q. Have you ever been a juror before?
A. No, sir.
Q. How old did you say you were?
A. Thirty.
Q. Are you married or single?
A. Single.
138 Q. Have you ever heard or read about this case?
A. No, sir.

Q. Have you ever talked to anybody about it, or have they talked to you?

A. No, sir.

Q. Have you any opinion at the present time as to the guilt or innocence of the defendant?

A. No, sir.

Q. Have you any prejudicy against the defence of insanity where it is interposed in a case of this kind?

A. No, sir; I can't say I have.

Q. You would give to it the same consideration as any other defence?

A. Yes, sir; I could.

Q. If the evidence offered on the subject of insanity were to raise a doubt in your mind—that is a reasonable doubt—as to whether or not at the time of the commission of the act the defendant was sane or insane; in other words, if after hearing the testimony you were not satisfied and couldn't make up your mind whether he was sane or not, and the court should instruct you that that was sufficient to raise a reasonable doubt as to the defendant's guilt, would you give him the benefit of the doubt and acquit him?

A. I think I would.

Q. Do you know of any reason why you couldn't sit as a fair and impartial juror in this case?

A. No.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

How long did you say you had been here, Mr. Stone?

139 A. Not quite three years.

Q. Are you acquainted with Mr. Dillon?

A. No, sir.

Q. Do you know the defendant?

A. No, sir.

Q. Do you know the father of the defendant, Robert Matheson?

A. No, sir.

Q. Are you acquainted with any of the witnesses?

A. I don't know who they are.

Q. Has anyone from Chicken Creek or the Fortymile ever talked with you about the facts of the case?

A. No, sir.

Q. Have you ever had an opinion as to the guilt or innocence of the defendant, or have you now?

A. No, sir.

Q. Are you opposed to capital punishment?

A. No.

Q. So that although the penalty might be, if the defendant should be found guilty as charged—that he might be executed, you have no such conscientious opinions as would preclude you from returning a verdict of guilty if the evidence warranted it under the instructions of the court?

A. No, sir.

Q. That is, you would return such a verdict under the evidence and the instructions of the court?

A. Yes, sir.

Q. Have you any prejudice for or against the Government or the defendant?

A. No, sir.

Q. You think you can be absolutely fair and impartial in the trial of this case if accepted as a juror, Mr. Stone?

A. I think so.

Q. And you would do so?

A. Yes, sir.

Q. Let's see, where did you say you lived?

140 A. On Ester Creek.

Q. You have some relatives out there, have you?

A. No, sir.

Q. Did you live right in the town of Ester?

A. No, I live on Ready Bullion, above Ester City.

Q. There are some Stones in Ester City—they are no relation of yours?

A. No.

(The juror is accepted.) (10)

The special venire being exhausted, the court orders a special venire to issue to the U. S. marshal for 15 talesmen to be summoned from the body of the district, returnable at 11 o'clock of this date.

Special venire returned at 11.07, and after qualifying, O. E. TACKSTROM, called from special venire and first duly sworn to answer upon his voir dire, testified as follows:

Direct examination by Mr. DILLON:

You know what this case is about?

A. No, sir.

Q. This is the case of the United States against George Matheson, wherein the defendant has been indicted for murder in the first degree, being accused of having killed one Lawless, on Chicken Creek, a year ago last May. Have you ever heard of the case?

A. Yes, sir.

Q. And read about it?

A. Yes, sir.

Q. Have you ever talked to anybody about the case?

A. Nothing in particular, no.

Q. Did what you read and the conversation you had, cause
141 you to form an opinion as to the guilt or innocence of the defendant?

A. No, I have not.

Q. Have you any such opinion now?

A. No, I have not.

Q. You say you were born where?

A. Nebraska.

Q. You're a merchant by occupation?

A. Yes, sir.

Q. And you have been connected with the stage line, have you?

A. Yes, sir.

Q. Are you acquainted with the defendant?

A. I am not.

Q. Or his father?

A. No, sir.

Q. You haven't talked with any of the witnesses about the case, I believe you said?

A. No, sir.

Q. Do you know of any reason why you wouldn't make a fair and impartial juror in this case?

A. No, I do not.

Q. Have you any prejudicy against the defence of insanity where interposed as a defence in a case of this kind?

A. Yes, sir; I have.

Q. Is that prejudice marked or strong?

A. I couldn't say it was, no.

Q. Would it take more evidence to convince you of insanity than any other legitimate defence?

A. I think it would.

Q. Do you think insanity is a legitimate defence—in your opinion?

(Objected to as calling for the opinion of the prospective juror on a question of law. Objection overruled.)

Q. Well, it has struck me that the plea of insanity is a pretty easy one to get off on; that's the way I have thought about it in connection with murder cases.

142 Q. Is your prejudice against it really against insanity as a defence, or against the abuse of it?

A. The abuse of it as a defence.

Q. Do you believe a man who is insane should be excused from the consequences of his acts?

A. Yes, I do, if he is really insane.

Q. You don't think an insane man should be punished when he don't understand the consequences of what he is doing?

A. No, I do not.

Q. Would it require more evidence to prove the defence of insanity than, say, self-defence?

A. Yes, sir.

Q. You think it would?

A. Yes, sir.

Q. Don't you think that the defence of self-defence is abused as much, and even more, than insanity in cases of this kind?

A. Well, it's about a stand-off I guess.

Q. Why should it require more and better evidence to prove one defence than another, unless you have a real prejudice against the defence of insanity?

A. Well, I have no real prejudice against it; I could be fair in it; there is no question about that.

Q. If the evidence introduced were such that while it didn't convince you of the insanity of the defendant, yet it raised in your mind a reasonable doubt as to whether or not at the time of the commission of the act the defendant was insane, and the court should instruct you that such a doubt under the law should be resolved in favor of the defendant, would you give him the benefit of that doubt in that case?

A. Yes, sir.

Q. Just as freely as if the doubt were raised from any other

143 facts in the case?

A. Yes, sir.

Q. Do you think you can fairly hear and weigh the testimony offered in support of the defence of insanity?

A. I think I could.

Q. And weigh it as fairly as any other testimony?

A. I think I could.

Q. Do you know of any reason why you should not do so, if that were the defence in this case, and make a fair and impartial juror?

A. No, I do not.

Q. How old are you, Mr. Tackstrom?

A. Thirty-one.
Q. Have you ever been a juror in a criminal case before?
A. No, sir.
Q. Have you ever been interested in a criminal case, either directly or indirectly?
A. No, sir.
Q. You say you're not acquainted with the defendant or his father?
A. No, sir.
Q. And haven't talked with any of the witnesses in the case?
A. No, sir.
Q. How long since you have read of it in the papers?
A. I don't know—when it occurred—in the local papers.
Q. You didn't read an account in one of the papers a few days ago as to what some of the testimony would probably be?
A. No, I did not.
Q. You don't remember of reading that?
A. No, sir, I do not.
(Defendants challenges peremptorily.) (12)

144 FRED UMPHREY, called from special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

You reside here in Fairbanks?
A. Yes, sir.
Q. You have heard this case talked about?
A. Why, nothing to speak of; no, sir.
Q. You're in one of the barber shops here?
A. Yes, sir.
Q. Haven't your customers discussed it?
A. Why, no; not a great deal.
Q. Did you ever hear the facts of the case talked about?
A. No, sir.
Q. You have read about the case?
A. Well, if I have ever read about it, it has gone out of my mind altogether.
Q. You know what the case is about?
A. Yes, sir, I do; since I came up here to-day.
Q. Where were you born?
A. In Iowa.
Q. How long did you live there?
A. You mean since I have been there?
Q. Yes; how long has it been since you left Iowa?
A. Fourteen years ago.
Q. How long have you been in the barber business?
A. Twelve years.
Q. How long have you been in Alaska?
A. Since nineteen hundred.
Q. You don't know the defendant nor his father?
A. No, sir.

Q. Have you any prejudicy against the defence of insanity as a defence to a charge of this kind?

A. Why, I don't know as I have; no, sir.

145 Q. You could entertain that the same as any other defence?

A. No, sir.

Q. It would require more evidence than any other defence?

A. If they prove that he was insane; yes, sir.

Q. Well, would it require the same character and degree of proof to prove that as any other defence?

A. Certainly.

Q. If evidence was offered in behalf of the defendant which raised in your mind a reasonable doubt as to whether or not he was insane at the time of the commission of the act—in other words, if you couldn't make up your mind whether he was insane or not, but there was a reasonable doubt as to his insanity, and the court should instruct you that that was sufficient to raise a reasonable doubt as to his guilt—could you give him the benefit of that doubt and bring in a verdict of not guilty?

A. Why, I don't really know.

Q. You don't know whether you could or not?

A. Well, it all depends, I guess.

Q. On what?

A. How I feel in regard to the matter when I hear the evidence.

Q. Well, how do you feel in regard to a question of that kind right now?

A. It all depends on the testimony with me.

Q. I am asking you if the testimony were such that you weren't able to make up your mind whether he was insane or not, and the court should say to you in his instructions that that state of mind of yours was sufficient to raise a reasonable doubt as to whether or not the defendant was guilty, and the court should also instruct you that every reasonable doubt should be resolved in favor of the

146 defendant, and if you had a reasonable doubt you should acquit him, under those circumstances would you bring in a verdict of not guilty?

A. Well, if there was a doubt in my mind with reference to it I would give it to him, I guess.

Q. Do you know whether you would or not?

A. Yes, I know I would.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Is Mr. Dillon your attorney in any matter, Mr. Umphrey?

A. Sir?

Q. Has Mr. Dillon been your attorney in any matter?

A. No, sir.

Q. And has he been?

A. Never.

Q. You're not acquainted with the defendant's father, Robert Matheson?

A. No, sir.

Q. Have you any opinion as to the guilt or innocence of the defendant at this time?

A. No, sir.

Q. None whatever?

A. No, sir.

Q. I believe you stated to Mr. Dillon that you hadn't heard the case discussed by anyone who purported to know the facts?

A. I never have.

Q. Do you read the newspapers?

A. Very little.

Q. You are opposed to capital punishment, are you not?

A. Yes, sir.

(Government challenges for cause.)

The COURT:

You say your are opposed to capital punishment?

147 A. Well, if a man showed me where a man had committed cold-blooded murder, why, capital punishment in that case is all right.

Q. If the evidence showed that beyond a reasonable doubt?

A. Cold-blooded murder; yes, sir.

Q. That is, you have no prejudice against capital punishment in a proper case?

A. No, sir.

By Mr. CROSSLEY:

Do you mean you have no prejudice against capital punishment where the evidence justifies it under the instructions of the court?

A. No, if it was murder in the first degree it would make no difference to me—in a case of cold-blooded murder I think that is where a man should go.

Q. Have you any prejudice against the Government or the defendant?

A. No, sir.

Q. The fact that you have some prejudice against capital punishment, would that have some influence on your verdict?

A. I don't know as it would; no.

Q. So you feel that you would make an absolutely fair and impartial juror, do you?

A. I don't know; this is my first experience as a juror, and I don't know how I would act.

Q. You don't know whether you would be fair and impartial or not?

A. I would try to be, I guess.

Q. Can you say to the court at this time that you could be and would be?

A. To the best of my ability I would—I would do what I thought was conscientiously right—I guess thats——

(Government challenges peremptorily.) (2)

148 C. C. PINE, called from special venire and first duly sworn to testify the truth on voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside, Mr. Pine?

A. On Ester Creek.

Q. How long have you lived there?

A. I have lived there four years.

Q. I think you said you were born in Canada?

A. Yes, sir.

Q. How long have you lived in the States?

A. Since 1883.

Q. What was your occupation before coming to Alaska?

A. Woodsman—timber.

Q. How long were you in Canada before you came to the United States?

A. Fourteen years.

Q. You followed lumbering in the woods until you came to Alaska?

A. Yes; in Michigan and in Washington.

Q. How old a man are you?

A. Forty-four.

Q. Are you married or single?

A. I am a widower.

Q. You have children?

A. Yes, sir; two.

Q. Are they here or in Washington?

A. They are in Washington.

Q. Have you ever talked of this case to anybody?

A. I have heard it discussed a little, not particularly, and have read accounts of it in the papers.

Q. Did the discussion you had and what you read about it cause you to form an opinion as to the guilt or innocence of the defendant?

A. No, sir.

149 Q. Have you any such opinion now?

A. No, sir.

Q. Have you any prejudice against the defence of insanity?

A. No, sir.

Q. Could you give the evidence of insanity the same consideration as evidence of any other defence and weigh it fairly and impartially?

A. Certainly.

Q. And if the evidence were not conclusive, but were sufficient to raise in your mind a substantial doubt as to the sanity or insanity of the defendant; in other words, if after having heard the testimony on the subject you were not able to make up your mind as to the sanity of the defendant at the time of the commission of the act, and the court should instruct you that was sufficient to raise a reasonable doubt as to his guilt, could you resolve that doubt in his favor?

A. I think it would be my duty.
Q. And you could do so?
A. Yes, sir.
Q. Do you know of any reason why you should not sit as a juror in this case?
A. I do not; no, sir.
(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Has Mr. Dillon been your attorney in any matter?
A. No, sir; he has not.
Q. You said you had heard some parties talk about it; did they claim to know the facts of the case?
A. Well, I heard one of the principal witnesses speak of it.
Q. Recently?
A. Well, probably two months ago.
150 Q. And from what he said did you form an opinion in the matter in any way?
A. No, sir; I couldn't form an opinion only just on the testimony given here. I wouldn't allow any outside opinion to influence me.
Q. As to the statement of Mr. Dillon—of course you haven't heard any testimony here yet?
A. I know; but I say whatever I heard here is the only thing that would cause me to form an opinion.
Q. You think you can be absolutely fair and impartial as a juror if selected?
A. I don't see why I should not.
Q. You're not in favor of capital punishment are you, Mr. Pine?
A. Yes, sir.
Q. So that you do not have any conscientious opinions or scruples against finding the defendant guilty if the evidence warranted it under the instructions of the court, even though the penalty might be death?
A. I'm not prejudiced against it at all.
Q. Have you no prejudice?
A. No, sir.
Q. You are in favor of the enforcement of law, and have no prejudice against the Government or the defendant in any way I suppose?
A. None whatever.
(United States challenges peremptorily.) (3)

M. ROSENTHAL, called from special venire and first duly sworn to answer on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

How long have you lived here in Fairbanks, Mr. Rosenthal?
151 A. Over a year now.
Q. Are you married or single?
A. Single.
Q. Do you know the defendant?

A. No.
Q. Do you know his father, Robert Matheson?
A. No.
Q. Have you talked with anybody about this case?
A. No.
Q. Have you read about it?
A. No; I don't think I did.
Q. You don't know whether you did or not?
A. No.
Q. Do you know what the case is?
A. Not in the least.
Q. Well, in this case this young man is indicted charged with murder in the first degree for having killed a man in the Chicken Creek country about a year and a half ago.
A. Yes; I recollect I heard of it at that time.
Q. Have you any opinion as to the guilt or innocence of the defendant at this time?
A. Not in the least.
Q. What is your occupation?
A. Merchant.
Q. How long have you followed that occupation?
A. O, quite a while—practically all my life-time.
Q. Have you any prejudice against insanity where interposed as a defence in a case of this kind?
A. To express my candid opinion, I don't know; I have never been on a jury before and couldn't say.
Q. Well, if it should be shown by the evidence that the defendant was insane or probably insane at the time of the commission of the act and the court should instruct you that the law would excuse him from the consequences of his acts, would you bring in a verdict accordingly?
A. I do believe that in moments of passion a person can go insane under those conditions.
Q. That isn't the question. The question is simply this:
152 Whether you have any prejudice or feeling against the defence of insanity?
A. Not in the least.
Q. You would be willing to consider the evidence of insanity the same as any other?
A. Yes, sir.
Q. Do you know of any reason why you could not and would not make a fair and impartial juror in this case?
A. Well, I know I don't believe in capital punishment.
Q. Do you mean that you don't believe in it in any event?
A. No; I don't.
(Defendant passes for cause.)
The COURT. Our code provides that he is disqualified under those conditions and I think he should be excused. Is there any objection?

Mr. DILLON. I suppose not, under the law.
(Juror excused for cause.)

A. L. KIEVICZ, called from the special venire and first duly sworn to answer upon his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

How long have you lived in Fairbanks?
A. Ever since 1905.
Q. Your occupation is that of a miner?
A. Yes, sir.
Q. How long have you been following mining?
A. Since I was about twelve years old.
Q. It has always been your occupation?
A. Yes, sir.
Q. Are you married or single?
A. Married.
Q. Is your family here?
A. Yes, sir.
Q. Have you just a wife, or have you children?
A. Just my wife.
Q. Have you ever talked with anybody about this case?
A. Well, in general conversation I think I did—somebody
153 was telling me about this case.
Q. This is what is known as the Chicken Creek case?
A. Yes; I know—I read it in the paper at the time the murder was committed.
Q. Have you formed an opinion as to the guilt or innocence of the defendant?
A. Yes, sir. Certainly if a man reads something he has to form some kind of an opinion.
Q. Well, I want to know whether you have an opinion as to his guilt or innocence. If you have, just say so.
A. Well, I practically did form some kind of an opinion.
Q. And you have that opinion yet?
A. I believe I do.
Q. Is that such an opinion as would taken evidence to remove or to change?
A. I couldn't say that, because I don't know. I only formed what opinions I have from newspapers and newspaper reporters.
Q. Have you heard people talk about it?
A. Yes; I have heard them talking about it—yes.
Q. Did you ever talk with anybody about it yourself?
A. Not directly; that is, I mean particularly about the case is only what they said.
Q. You overheard what was said?
A. Yes, sir.
Q. How long ago was that?
A. It was at the time when the papers—in fact, just before the marshal served the subpœna on me.

Q. You heard it talked about then on the street?
A. No; in the hotel.
Q. Do you know the party you heard speak about it?
A. I only knew the party by sight.
Q. Do you know whether it was one of the witnesses in the
154 case or not?
A. [illegible]'t know; I couldn't say as to that.
Q. Well, and what you hear them say, together with what you read about the case——
A. It has confirmed my opinion.
Q. And you still have that opinion?
A. Well, I believe I have.
(Defendant challenges for cause.)

Cross-examination by Mr. CROSSLEY:

Could you disregard the opinion which you now have and try the case fairly and impartially on the evidence submitted here, under the instructions of the court?
A. Yes; I believe I can.
Q. And would you do that if selected as a juror?
A. Well, yes; I guess so.
Q. Well, this happens to be a place where you can't guess very much. What is the fact?
A. Well, I could'nt say what the evidence would be.
Q. That isn't the question. Can you disregard any opinion you might have had or even have now, and listen to the evidence of the witnesses given on the stand and render a fair and impartial verdict under the evidence and instructions of the court?
A. Yes, sir.
Q. And you would do that?
A. Yes, sir.
The COURT. The challenge will be denied.

Redirect examination by Mr. DILLON:

I didn't ask you—have you any prejudicy against the defence of insanity in a case of this kind?
155 A. Which way do you mean?
Q. If the evidence should show that the defendant was insane or was not of sound mind at the time he committed the act, and if the court should instruct you that that would excuse him from the consequences of his act, and that he should be acquitted, you haven't any prejudice against that kind of defence?
A. Yes; I do have that kind of a feeling.
Q. You are prejudiced against that as a defence?
A. Yes, sir.
Q. You think that ought not to be introduced as a defence in a case of this kind?
A. Yes, sir.
(Defendant renews his challenge.)

Recross-examination by Mr. CROSSLEY:

If it was bona fide, or the defence was made in good faith, Mr. Kievicz, and it raised a reasonable doubt in your mind as to his guilt on account of the fact that he might have been insane at the time the act was committed, if the court so instructs you, you would return a verdict of acquittal, would you not?

A. You mean in regard to insanity?

Q. That is, if the court should instruct you that if you had a reasonable doubt of the defendant being guilty because of the fact that he might have been insane at the time——

A. Yes, sir.

Q. —you would return a verdict of not guilty, would you not?

A. Well, yes; if he was proven insane.

Q. You say you are prejudiced against that sort of a defence?

A. Yes.

156 Q. You mean you have a prejudice against that defence just like any other defence that isn't really a defence but merely made as an excuse, don't you?

A. Yes.

Q. So that if under the instructions of the court, if the court should instruct you that if you had a reasonable doubt of the defendant's guilt because of the fact that he might have been insane at the time the murder was committed, you would return a verdict of not guilty, would you?

A. Well, I believe I would.

Q. You think you would—that is, you would want to be convinced beyond a reasonable doubt that he was guilty?

A. Yes, sir.

The COURT:

Mr. Kievicz, have you ever sat on a criminal case before?

A. No; never.

Q. Well, in a criminal case, before a jury is justified in convicting a defendant, it must be proved to their satisfaction beyond a reasonable doubt that the defendant is guilty. And the court will define to the jury what a reasonable doubt is.

A. Yes.

Q. Now, if insanity should be interposed as a defence here—that is, if the defendant should claim that he committed the crime, but was insane at the time, and if the evidence in the case should raise in your mind a reasonable doubt as to his mental responsibility—would you and could you resolve that doubt in his favor and acquit him under the instructions of the court?

A. I believe I would; yes, sir.

Q. Well, do you know you would?

A. I couldn't say, because——

157 Q. Well, if the court defines to you what is a reasonable doubt, you would follow the instructions of the court, would you not?

A. Yes, sir.

Q. And if the evidence—you understand, the jury deals with the evidence alone—the court gives you the law—if the evidence should not satisfy you beyond a reasonable doubt of the guilt of the defendant, and the court told you that under those circumstances you must acquit the defendant, would you resolve that doubt in his favor and acquit him?

A. Yes, sir.

Q. Would you acquit him if the evidence created in your mind a reasonable doubt and the court told you that under those circumstances under the law he should be acquitted?

A. I think I would.

Q. Well, is there any doubt in your mind about it? You say you are prejudiced against insanity as a defence.

A. Yes; speaking in that way, an insane man ought not to be at large.

Q. That's what you believe?

A. Yes, sir.

Q. You don't believe in punishing insane men for their acts?

A. I believe I do.

Q. You believe in sending them to the penetentiary or hanging them, do you?

A. Yes, sir.

Q. That is, if they killed a man while insane?

A. Well, if they are insane—if one man kills another—when one man kills another he is practically insane anyhow, and a man ought to be punished for killing people.

Q. You think, then, that he should be punished even though he was insane?

A. Yes.

(Challenge sustained. Excused for cause.)

158 C. H. McGrew, called from special venire and first duly sworn to answer on voir dire, testified as follows on—

Direct examination by Mr. Dillon:

Where do you live, Mr. McGrew?

A. Fairbanks—over here across the Slough.

Q. Are you married or single?

A. Married.

Q. Is your family here?

A. No, sir; outside.

Q. Where?

A. In Seattle.

Q. How long have you been in the interior?

A. About three years.

Q. What is your occupation?

A. Mining.

Q. Are you mining now?

A. No; I quit in February to go below.
Q. Where were you born?
A. Iowa.
Q. How long did you live there?
A. Twenty-six years.
Q. What was your occupation there?
A. Well, I was raised on a farm.
Q. Then where did you go from there?
A. California.
Q. What did you do there?
A. Farming.
Q. And where did you go from there?
A. Seattle.
Q. And what did you do there?
A. Well, I done grading work and dealt in stock.
Q. How long were you in Seattle?
A. About twenty-three years; close to that.
Q. Did you ever hold office in the city government?
A. Not in Seattle—well, yes; I was deputy marshal.
Q. For how long?
A. Just one week.
Q. How long ago was that?
A. That was about twenty-two years ago.
Q. Were you city marshal?
A. No, sir.
Q. U. S. deputy marshal?
A. Yes, sir.
159 Q. About one week?
A. Yes, sir.
Q. About twenty-two years ago?
A. Yes, sir.
Q. Have you ever held any similar office since?
A. No, sir.
Q. You're not a politician then?
A. No, sir.
Q. Have you ever been a juror before?
A. Once.
Q. In a civil case or criminal case?
A. Civil case.
Q. How long ago was that?
A. About six years ago.
Q. Have you heard this case discussed?
A. No, sir.
Q. Did you read about it?
A. No; I don't believe I did—come to think of it I believe I did. I was working out on the Government road and I believe there was a witness came down from Carey, or I heard he was a witness on some case that happened up on Chicken Creek.
Q. Did you ever hear the details of the case?

A. No, sir.

Q. Have you an opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. What is your age, Mr. McGrew?

A. Fifty-two.

Q. Have you any or do you know of any reason why you could not be a fair and impartial juror in this case?

A. No, sir.

Q. Have you any prejudicy against the defence of insanity?

A. No, sir.

Q. You would entertain that defence the same as any other?

A. I would.

Q. If there was a doubt in your mind as to whether he was sane or insane growing out of the evidence, and the court should instruct you that such a doubt was sufficient to raise a reasonable doubt
160 of the defendant's guilt, would you give him the benefit of it?

A. I would, sir.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Mr. Dillon hasn't been your attorney in any matter?

A. No, sir.

Q. Have you any matters of litigation or lawsuits pending in this court?

A. None at all.

Q. You have no opinion as to the guilt or innocence of the defendant?

A. No, sir; I have not.

Q. You think you may have read the newspapers or heard others talk about the case?

A. Well, I never read that account of it.

Q. Would you listen to the evidence in the case and take the instructions of the court as to the law and render a just and impartial verdict?

A. Yes, sir.

Q. You would do that, would you?

A. Yes, sir.

Q. In a case of this kind, Mr. McGrew, where the defendant is charged with murder in the first degree, the penalty might be death if he was found guilty. Have you any conscientious opinions against that penalty that would prevent you from rendering such a verdict if the evidence warranted it?

A. No, sir; I would find him guilty.

Q. If the evidence warranted under the instructions of the court?

A. Yes, sir.

Q. You are in favor of the enforcement of the law?

161 A. Yes, sir.

Q. And you have no prejudice against the Government or the defendant, have you?

A. No, sir; none whatever.
(Juror is accepted.) (11)

JOHN CARLIN, called from special venire and first duly sworn on his voir dire, testified as follows on—

Direct examination by Mr. DILLON:

Where do you reside?
A. On Vault Creek.
Q. How old are you?
A. Thirty-six.
Q. Where were you born?
A. Minnesota.
Q. How long did you live there?
A. About twenty-five years.
Q. What was your occupation there?
A. Horseshoer.
Q. I mean what was your occupation in Minnesota?
A. Blacksmith.
Q. By trade?
A. No; I was a horseshoer in Minnesota; I was a miner here.
Q. You followed blacksmithing and horseshoeing—where, down about the race tracks?
A. No, sir; a custom shop in Minneapolis.
Q. Have you ever been a juror in a criminal case?
A. No, sir.
Q. Have you ever had any trouble yourself that brought you before the courts?
A. No, sir.
Q. Have you ever talked with anybody about this case?
A. No, sir; I don't think so.
Q. Have you ever heard people talk of it in your presence?
162 A. I don't remember of hearing any one.
Q. Have you read about the case?
A. At the time it occurred I read about it.
Q. Have you read anything about it since?
A. No, sir.
Q. Have you been reading the papers recently—the last day or two?
A. Well, just sketches here and there.
Q. You didn't read of any of the particulars in this case?
A. No, sir.
Q. Did what you read cause you to form an opinion against the defendant in this case as to his guilt or innocence?
A. No, sir.
Q. Have you any reason why you would not make a good juror?
A. No, sir.
Q. You have no bias or prejudice for or against the defendant or the Government?
A. No, sir.
Q. You believe in the enforcement of the law?

A. Yes, sir.

Q. Have you any prejudicy against a defence of this kind where it is interposed as a defence?

A. No, sir.

Q. You would give it the same fair consideration you would any other defence?

A. Yes, sir.

Q. Would it require any more evidence to prove insanity than it would any other fact?

A. No, sir.

Q. If there was a doubt in your mind as to whether or not the defendant was insane at the time of the commission of the act—that is, if the evidence was such that it left a doubt in your mind—

163 in other words, if your mind was in such a condition that you could not reach a conclusion satisfactory to yourself whether or not he was insane, and the court should instruct you that such fact was sufficient to constitute a reasonable doubt of guilt, would you resolve that doubt in his favor?

A. Yes, sir.

Q. And would you do so?

A. Yes, sir.

Q. If selected as a juror in this case, will you listen to the evidence fairly and render a verdict in accordance therewith and with the law?

A. Yes, sir.

Q. And you know of no reason why you can not or should not sit as a juror in this case?

A. No, sir.

(Defendant passes for cause.)

Cross-examination by Mr. CROSSLEY:

Do you know the defendant, Mr. Carlin?

A. No, sir.

Q. Do you know his father, Robert Matheson?

A. No, sir.

Q. Do you know any of the witnesses in this case?

A. No, sir.

Q. And you haven't talked with anybody about the case?

A. No, sir.

Q. So you haven't any opinion or impression at this time as to the guilt or innocence of the defendant?

A. No, sir.

Q. Do you know Mr. Dillon?

A. No, sir.

Q. He hasn't been your attorney in any matter then?

A. No, sir.

Q. You are opposed to capital punishment, are you, Mr. Carlin?

164 A. No.

Q. Then you have no objection to that punishment where the evidence warrants it under the instructions of the court?

A. No, sir.

Q. You would not say that you have such conscientious opinions against it as would preclude you from finding a verdict of guilty on a charge of this kind where the evidence warranted it under the instructions of the court?

A. No, sir.

Q. Have you ever had any trouble like this, where you or the party you had trouble with resorted to the use of firearms?

A. No, sir.

Q. Have any of your folks or close friends?

A. No, sir.

Q. So you think you can enter upon the trial of this case as an absolutely fair and impartial juror, do you?

A. Yes, sir.

Q. And you would decide the case solely on the evidence you hear here on the witness stand, under the instructions of the court?

A. Yes, sir.

Q. You believe in the enforcement of law?

A. Yes, sir.

Q. You haven't any prejudice against the Government or against the defendant in any way?

A. No, sir.

Q. Have you any prejudice against the Government in its enforcement of the laws?

A. No, sir.

Q. You think the law should be enforced and complied with?

A. Yes, sir.

Q. How long did you say you had been living in Alaska?

165 A. Since 1904.

Q. You have been in the business of horse-shoeing during all of that time?

A. No; I have been mining here.

Q. But you were a horse-shoer in Minneapolis?

A. Yes, sir.

Q. Where did you say you were mining now?

A. On Vault Creek.

Q. You just came in from there, did you?

A. No; I have been in during Labor Day.

Q. Where are you stopping?

A. At the Golden Gate Hotel.

Q. Do you know whether any of the witnesses in this case are stopping there?

A. No, sir; not that I know of.

Q. No one has talked anything to you about it?

A. No, sir.

(The juror is accepted.) (12)

Whereupon the jury was sworn to try the cause, and being duly cautioned, the court adjourned until 2 p. m. of this date.

And be it further remembered that thereafter and on the said September 8th, 1909, at 2 o'clock p. m., after the jury in said cause had been duly empaneled and sworn to try the same, the counsel for the parties respectively made their opening statements to the jury, after which the following proceedings were had, to wit:

166 JOE LAWLESS, witness called on behalf of the United States and being first duly sworn, testified as follows on—

Direct examination by Mr. CLEGG, assistant district attorney:

Your name is Gus Lawless?

A. No, sir; Joe Lawless.

Q. Where do you live, Mr. Lawless?

A. Here in Fairbanks.

Q. Where did you live prior to coming to Fairbanks?

A. On Chicken Creek.

Q. What district is that in?

A. That's in the Fortymile district.

Q. In the Third Division of the Territory of Alaska?

(Objected to as leading.)

The COURT. These matters are purely preliminary, Mr. Dillon, and the statute provides that leading questions are permissable in respect to preliminary matters. The objection is overruled.

(Exception.)

Mr. CLEGG. That is in the Third Division—formerly the Third Division and now the Fourth Division of the Territory of Alaska is my question?

A. Yes, sir.

Q. How long had you been up there Joe, prior to the 24th day of May, 1908?

A. I had been up there in 1907 in May, well, it was the last of April I guess.

Q. April, 1907?

A. Yes, sir.

Q. You had been working up there had you prior to this time?

A. Yes, sir.

Q. Were you present there at Chicken Creek in the month of

167 May, 1908?

A. Yes, sir.

Q. Whereabouts on Chicken Creek?

A. Yes, sir.

Q. Do you know a place there known as Struck & Van Hook's saloon?

A. Yes, sir.

Q. Do you know of a boarding house there conducted by a man by the name of Holbrook, close to there?

A. Yes, sir.

Q. Did you have a brother there at the time—any relative of yours?

A. Yes, sir; my brother.
Q. What was his name?
A. Gus Lawless.
Q. How old a man was he?
A. Thirty-three.
Q. How much did he weigh?
A. About a hundred and sixty-five.
Q. How high was he?
A. About an inch an a half shorter than I was—about five foot eight.
Q. That would make him about five feet six and a half?
A. Yes, sir.
Q. How old are you?
A. Forty-four—I was born in 1865.
Q. Where were you born?
A. Nanaimo.
Q. That's in British Columbia?
A. Yes, sir.
Q. Now just recall if you can the afternoon of the 24th day of May, 1908, and state to the jury whether or not you knew a man by the name of George Matheson at that time?
A. Yes, sir.
Q. How long had you known him—about how long?
168 A. About eight months, then.
Q. About eight months; is that George Matheson here?
A. Yes, sir.
Q. Was he residing in that vicinity at that time?
A. Yes, sir.
Q. Did you see him on the 24th day of May, 1908, at Chicken Creek there?
A. Yes, sir.
Q. Where did you see him?
A. In Henry Struck's saloon.
Q. About what time did you see him in there that day?
A. That day?
Q. Yes, sir.
A. He was there all day.
Q. Were you there most of the day, too?
A. Yes, sir.
Q. Well, do you recal' when your brother ca*n* there, Gus—how long was he there?
A. At the saloon?
Q. Yes, sir.
A. Well, he didn't go to work that day; he was sitting around there all day.
Q. Sitting around different places, I suppose?
A. Yes, sir.
Q. What time was he at the saloon, do you remember, in the afternoon?

A. In the afternoon about two—it must have been about two o'clock, something like that, when he went in.

Q. Do you recall having any conversation there that afternoon with George Matheson when your brother Gus was present?

A. Yes, sir.

Q. Well, just state to the jury about how that arose; will you just tell the jury about that conversation or argument
169 you had there and who was present—as near as you can, will you?

A. Yes, sir.

Q. All right.

A. Do you want me to tell right from the start, or——

Q. Why, just tell approximately what occurred there that afternoon?

A. Well, about two o'clock we was all sitting there and standing at the bar there—I was standing at the bar there with my back up against the bar and Matheson came in—there was a spittoon in the middle of the floor and he makes a run and kick at it and lands it back to the door like, towards the back; and Penrose says, "You ought to have more sense that that—— "

Q. What Penrose was that—what's his first name, do you know?

A. No, sir; I don't know his first name.

Q. All right, go ahead.

A. Well, he comes from behind the bar then and swept up the sawdust and stuff that Matheson kicked up, and he says, " You don't need to start any rough-house here—— "

Q. Who says that?

A. Well, Penrose—and George says " Let's start a rough-house or something here," and everybody laughed at him, and Penrose then came from behind the bar and swept up the sawdust and he says: " There is no use starting a rough-house here, there is no fun in that," and we went out.

Q. Who did?

A. I know I did; I thought we all went out there—we left the bar I know. I think we went outside, and I was—let's see now.

Q. You had some discussion there about wrestling, didn't you?

A. No; not then.

170 Q. Well, afterwards?

A. Yes, sir.

Q. Well, what occurred at the time you had that talk?

A. Well, yes; we came in again, and Holbrook comes in——

Q. Who?

A. Scott Holbrook; John Anderson was there in the saloon and he jumps onto John Anderson's back.

Q. Who did?

A. Holbrook; and John Anderson throws his head down and Holbrook went sliding over his head, and they all laughed at him, and George comes up and grabs John, and John grabs George around

the arms and throws him across his hips and landed him down, and my brother says, "That's a very poor holt," he says, "to put on a man; if you took him lower down he wouldn't have throwed you so easy." Well, that was all settled there, and we went outside for a little while, and my brother comes in and he says, "Can't we get up some sport of some kind;" it was the 24th of May, you know, the Queen's birthday, and he says, "Can't we get up a tug of war for a barrel of beer?" He says, "Can't we get up a tug of war, the Americans against the Canadians, for a barrel of beer." And George speaks up, and he says, "There is no Americans here in the saloon;" he says, "We're all Canadians." Well, we couldn't get anything further than that; couldn't get up any sports in the way of a tug of war, and I went in the saloon—or, I was in the saloon then, and my brother went out and Matheson, he was in there, and after a while my brother comes back and he says, "George tells him that—he says John Anderson will wrestle you for a hundred and fifty dollars."

Q. Who said that?

A. George, here. My brother says "All right," and he
171 asked Penrose for a sheet of paper to write an order on his father for a hundred and fifty dollars. And my brother then asked Holbrook, I think he asked him for fifty dollars, or anyhow for some money, and I steps up towards my brother and I says, "We will sell the furs we have got—" we had two hundred dollars worth of furs, and I said we would sell that and let it all go in a bunch, and no sooner had I said we would bet it on Anderson than he lands on me——

Q. Who do you mean lands on you?

A. He makes a punch at me and I fell right near the door on the table and bar and George landed on me, and my brother stoops down over us and says, "Break away there; if you fellows want to fight," he says, "go outside." And by this time, as soon as I got up we was going outside to have it out, and I had broken my braces, and I backed up from the bar and was figuring on going outside and having a little fun; anyhow, I just had my waistcoat about half down when he comes in at me; he didn't make a punch or anything, but he comes in with his hand as though he was going to gouge me and get his finger in my eye; he didn't quite get me, but he left a finger mark on my eye, and that makes my brother wild and he says, "God-damned if I can stand that." So my brother shoves me back, he says, "keep back, you can't do anything." Well, he jumps in and grabs Matheson, and Matheson made kind of a plunge for my brother, and he had no sooner done that than he was on his back and my brother pasted him and says, "squeal when you have got enough." And some of the other boys, Penrose, he hollers to Gus and says, "let him up, he has got enough," and he did; he let him up and he backed up in the crowd; there was quite a big crowd around him, and
172 he stood right alongside of me.

Q. What did Penrose do after that?

A. What did he do?
Q. Yes?
A. He didn't do anything at all.
Q. Well, what did you fellows do?
A. Well, Penrose was going to lock up then. He said: "You fellows have got to go outside; I am going to lock up." And my brother says: "Well, we will have a drink first before we go out," and in the meantime when we was going towards the bar there was McRae, Jack McRae, and also—well, sir, I can't remember his name—the bartender——
Q. Penrose?
A. Yes; George was sitting in a chair like this, with his head down, and when we had a drink I turned around and looked at George, and he had his head down like this [illustrating], and we all went out and all we left in there was Penrose and Matheson.
Q. Who ordered you out?
A. Penrose.
Q. Who else was in there besides George Matheson, Penrose, and yourself? And your brother?
A. There was Holbrook—he was there at the time of the fight.
Q. Yes; I mean just before you went out of there?
A. Well, there was John Anderson, there was Ed Mack, there was Mr. Lake, there was old man Taylor—well, I don't know—yes, Mr. Norval.
Q. What did you do after you got outside?
A. We sat down out there a while on the bench—there was a bench out there.
Q. About how long did you stay there?
A. Well, sir, I don't know how long we did sit there.
173 Q. What condition were you in when you were in the saloon? Had you been drinking?
A. Yes, sir.
Q. How much?
A. Well, I had a few drinks in me. I was full, but I knowed what I was doing.
Q. You knew what you were doing?
A. Yes, sir.
Q. Well, how long did you stay outside after you got out?
A. O, we sat out there for a little while, and then we went off towards Kendall's.
Q. Where is Kendall's situated with reference to Struck's saloon? How far away is it?
A. Well, about a hundred—no, it's not a hundred—feet. I would call it eighty feet.
Q. Well, it was downstream from the saloon?
A. No, sir; up.
Q. To the left as you come out of Struck's saloon?
A. Yes, sir.
Q. Did you have some more drinks up there?

A. Yes, sir.
Q. How many?
A. I had one that I know of at the bar.
Q. And you stayed there for some time?
A. We stopped a little while; yes.
Q. About how long, do you remember, Joe?
A. No, sir; I don't remember. I know we didn't stop long at the bar.
Q. Well, most of you were together?
A. Yes, sir.
Q. And what did you do after that?
A. Well, we went outside, and it was about supper time.
174 The rest of the boys went to supper, and my brother wanted me to go, and I says: "No, you go on to supper; never mind me," and my brother went down, and Holbrook——
Q. Down where?
A. To supper.
Q. Where was that?
A. Down at Struck's place, Holbrook's restaurant—and Holbrook asked my brother where I was, and they tried to get me to go and have supper.
Q. You just tell what you did yourself, Joe; what did you do after they went down to supper—did you go down afterwards?
A. No, sir.
Q. How long a time did you stay at Kendall's before you went down to the boarding house?
A. Well, just about three or four minutes; by the time my brother went down and got washed he came back and he says to me: "You have got to go down to supper with me," and he took me by the arms and we walked arm-in-arm to supper.
Q. Well, did you have supper down there then?
A. Yes, sir.
Q. That is, at Holbrook's place?
A. Yes, sir.
Q. And how long did that take?
A. Well, sir; that's more than I can tell you.
Q. Do you remember who had supper with you?
A. No, sir; I do not.
Q. What did you do after supper—anything?
A. We came out in the post office, and my brother was sitting down.
Q. Where was the post office with reference to the dining room, Mr. Lawless?
A. Well, there was just a partition between.
175 Q. In the same building?
A. Yes, sir.
Q. The dining room on one side and the post office on the other?
A. Yes, sir.

Q. Well, what did you do after you got into the post-office department?

A. Well, me and Joe Anderson was talking together and my brother was sitting down either on a chair or on the sofa.

Q. Whereabouts was he with reference to the front door—do you remember that?

A. Front door?

Q. Yes, sir?

A. On the right-hand side going through from the front door. He was just about—O, he must have been sitting about eight feet from the door.

Q. Who else was sitting there in the room, or standing?

A. Well, I was standing?

Q. Well, who was standing?

A. Who else besides me?

Q. Yes, besides you and your brother; who else was in there?

A. Well, there was me and my brother, and Mr. Lake, and Mr. Owens——

Q. You mean Onings?

A. Onings; yes, sir.

Q. And who else?

A. And John Anderson—let's see; yes, Jack Anderson——

Q. Well, what occurred when you were in there, if anything?

A. Well, me and John was sitting or standing behind the stove, or near the stove, when Owens hollers to my brother "Gus," he says, "Look out, Gus, here comes Matheson," and he no sooner hollers that than Matheson is in.

Q. In where?

A. In the door.

176 Q. In the front door of this place of Holbrook's?

A. In the front door; yes, sir.

Q. Yes—all right.

A. And I looked, and I seen that Mr. Lake was right in front of Matheson——

Q. Yes.

A. —and he jumped in front of Matheson there, and Matheson he pops around him and my brother he makes a jump then and grabs for him and just then he fires a shot right at my brother's head like and as he does that Mr. Lake, I think, jerks his arm down——

Q. Who fired the shot?

A. Matheson and as his arm was jerked down the bullet ranged over towards the wall—he fires this way you see and it lands just alongside of him and ranges towards the wall or the ceiling. I don't know how it was, whether my brother couldn't hold him, but he had one of his knuckles drove back and he didn't have the grip to hold on to George with his hand I guess——

Q. Do you know of your own knowledge whether he had hold of Matheson's wrist?

A. He must have had hold of him, because he swung him down and the bullet landed across the other side.

Q. Well, what happened after that?

A. Well, the second shot he fired he fired it right here close to his head and my brother fell——

Q. Who fell?

A. He fell right over on his face down like that, and I runs up to him and I says, "For Christ's sake, you ain't shot are you, Gus," and right then my brother was laying right here and I was standing here and George was here and I was stooping down like that when
177 George fired the third shot into his head and I was right up close to him like this and I seen where his hair parted on the back and I seen the brain on the back part of his head ooze out of the hole and I grabs my brother and puts him against my breast, and I says, "You ain't dying, are you," and his lips moved and that was all.

Q. Did you see what sort of a gun he had?

A. No, sir.

Q. How many shots did you hear fired?

A. Three shots.

Q. How far is this restaurant or boarding-house and post-office from Struck's saloon?

A. About a hundred and fifty feet, something like that.

Q. Any side-walk connecting them?

A. Yes, sir.

Q. Now, do you suppose you would know a diagram of those buildings if you saw them?

A. I think I would.

Q. An accurate plat—you are familiar with the Struck saloon building on C'icken Creek where this occurred at the time it happened?

A. Yes, sir.

Q. And with the boarding-house and post-office building?

A. Yes, sir.

Q. Just look at this sketch, or map and plan and state [handing plat to counsel for defendant]——

Mr. DILLON. We will admit that is a correct diagram of the buildings and streets, although I don't know the situation personally, but that is correct I am positive—if it can be placed where all the jurors can see it.

Mr. CLEGG. Then the record can just show that it is agreed
178 that this is a correct representation of the premises and buildings—I will ask the witness about it further.

Mr. DILLON. Just let the record show that.

Mr. CLEGG. Just examine that plat, Mr. Lawless, and state to the jury what building that is here—what does that represent, that building on the right hand side?

A. That there?

Q. Yes, sir; No. 1, one here we will say?

A. That's supposed to be the saloon, isn't it?

Q. Yes, sir; do you recognize that as a correct representation of the saloon of Struck's as it existed on and before the 24th day of May, 1908, at the time this occurred?

A. Yes, sir.

Q. This mark here, that represents the bar?

A. Yes, sir.

Q. And this mark here represents the counter?

A. Yes, sir.

Q. And this little place here represents the stove—marked "Stove?"

A. Yes, sir.

Q. And this is the rear door and this the front door?

A. Yes, sir.

Q. And these marks here represents the windows?

A. Yes, sir.

Q. And this is the safe here?

A. Yes, sir.

Q. And a chair?

A. Yes, sir.

Q. And the back bar?

A. Yes, sir.

Q. And the ware-house?

A. Yes, sir; here.

Q. And this is the side-walk along here?

A. Yes, sir.

Q. Running down to the boarding-house and post-office building?

A. Yes, sir.

179 Q. Is that right?

A. Yes, sir.

Q. Mark this building No. 2, then, with a pencil—this is the dining-room half of this building?

A. Yes, sir.

Q. And this is the entrance, the door through here, is it?

A. Yes, sir.

Q. This is marked "Stairway," this compartment?

A. Yes, sir.

Q. And the doors are marked in the proper place on the plat itself?

A. Yes, sir.

Q. This is the front of the post-office building marked "C" we will say. Is that right?

A. Yes, sir.

Q. Can you state to the jury which way that door opened?

A. It opened in.

Q. Now on which side did it swing, to the right as you go in or to the left?

A. To the right.

Q. And this stove in here in that part of the post-office building, does that correctly represent to approximate position of the stove there, and the couch?

A. Well, I think it ought to be here by rights.

Q. How much further that way do you think it was—it came part way on the window as represented there on the map?

A. Yes, sir.

Q. And this rear part represents the post-office part of the room?

A. Yes, sir; and the wash-basin was in here.

Q. The sink, or wash-basin?

A. Yes, sir.

(Counsel for the Government offers the plat in evidence. No objection.)

180 (Plat marked "Plaintiff's Exhibit A.")

Q. Now, just for the benefit of the jury, who haven't seen this plat [exhibiting to jury]. I understand this is the saloon building?

A. Yes, sir.

Q. This is the side door and this the rear door?

A. Yes, sir.

Q. This is the sidewalk running to the boarding house and post-office building?

A. Yes, sir.

Q. And this is the warehouse intervening?

A. Yes, sir.

Q. Between the two is a blank space, is it?

A. Yes, sir.

Q. All right. Now, what did you do after the shooting occurred—what became of Matheson; do you know?

(Objected to as immaterial.)

The COURT (after argument). What occurred immediately afterwards he may state. Objection overruled.

(Exception.)

Q. Did you notice Matheson immediately after this shooting?

A. No, sir.

Q. You don't know whether he stayed in the room or went out?

A. He wasn't in the room.

Q. Did you seen what he did after he fired the last shot, or didn't you pay any attention to him?

A. No, sir; I just jumped down and grabbed my brother——

Q. Did you see Matheson after that?

A. No, sir; I didn't.

Cross-examination by Mr. DILLON:

What is your age, Mr. Lawless?

A. Forty-four.

Q. How long have you been in Alaska?

181 A. Since ninety-eight.

Q. You have been in the Chicken Creek country?

A. And Dawson.
Q. When did you first come to Chicken Creek?
A. I landed there in 1907.
Q. And how long after you came there before you became acquainted with the Mathesons?
A. It was when I came down from Chicken Creek—May, June—it was in July.
Q. About July, 1907?
A. Yes, sir.
Q. And remained in the Chicken Creek country all the time until this occurred?
A. Yes, sir.
Q. Was your brother there with you all the time?
A. Yes, sir. Well, we was out in the hills in the winter time, of course.
Q. That was your headquarters—you made that your home?
A. Yes, sir.
Q. What is your weight, Mr. Lawless?
A. My weight?
Q. Yes, sir.
A. Well, I would go about 169 pounds, I guess.
Q. How much did you weigh at the time of this occurrence?
A. I don't know what I did weigh then.
Q. You are about the same as you were then?
A. Yes, sir.
Q. You're a strong, healthy man?
A. No, sir; I'm not healthy.
Q. Were you unhealthy at that time?
A. I have been used up ever since 1900 in the back.
Q. What is the trouble?
A. I don't know; my brother used to roll me over like a kid.
Q. But you did propose to get into a wrestling match with
182 George Matheson. Didn't you offer to wrestle him or wrestle with him?
A. I don't remember that.
Q. Don't you know, as a matter of fact, that you and he were going to wrestle there in the saloon?
A. No, sir.
Q. You didn't; well, how did you get into this trouble? What was it all about?
A. Just taking my brother's part, after my brother started—after he challenged my brother I told him we would sell the skins to cover the bet.
Q. He never challenged your brother to wrestle at all, did he?
A. Yes, sir.
Q. Was he quarreling with your brother?
A. No, sir; not then.
Q. Nor hadn't been before?
A. No, sir.

Q. It was with you that he had words?
A. I don't remember.
Q. Don't you remember you and he were going to wrestle, and he said he could throw you, and you talked of betting a hundred dollars apiece, and that you did start to wrestle, and out of that wrestle you got into a fight and your brother got in and separated you?
A. No, sir.
Q. You don't remember that?
A. No, sir.
Q. Had you people been drinking that day?
A. Not very heavy.
Q. Hadn't you been drinking all day?
A. Well, I got out of bed at half past ten.
Q. You had been drinking all the night before?
A. No, sir.
183 Q. How soon after you got up did you commence to drink?
A. About half past eleven I took my first drink.
Q. What did you drink?
A. Beer.
Q. Did you have any other drinking that day?
A. Yes, sir; I had some liquor.
Q. What kind?
A. What time?
Q. How many drinks did you have?
A. Well, I can't tell.
Q. Can't you make a close guess?
A. No, sir.
Q. Do you remember all you did that day?
A. Well, I had four drinks in the morning—no; I had three glasses of beer first in the morning.
Q. And four glasses of whiskey?
A. Oh, no.
Q. How many then?
A. I never drank as much whiskey as that that day.
Q. How much whiskey did you have in the morning?
A. I didn't have any in the morning.
Q. What was the four drinks you had in the morning—you said you had three glasses of beer?
A. I had a glass of liquor in the morning.
Q. You said you had four drinks in the morning?
A. Well, I got stuck twice.
Q. Stuck at what?
A. Shaking dice.
Q. And what did you drink each of those times?
A. Beer—as soon as I arrived Penrose asked me to have a drink.
Q. And what did you take?
A. A glass of beer.
Q. Didn't you have anything else that morning?
A. Now, I don't remember—I had three drinks of that.

Q. Was that before you had breakfast?
A. No, sir; I had my breakfast.
Q. Before you came down?
A. Yes, sir.
184 Q. Did you eat dinner that day?
A. It was about dinner time when I had breakfast.
Q. Then in the afternoon how many drinks did you have—that is, if you know?
A. About four.
Q. What were they?
A. I had it mixed.
Q. Well, what did you drink?
A. Beer and rye.
Q. How many drinks of beer?
A. Well, sir, I think it was one beer; and I had three liquors besides.
Q. One beer and three drinks of rye, is your best recollection?
A. Yes, sir.
Q. Now, what time did this trouble begin?
A. About between four and half past.
Q. What started it?
A. The trouble?
Q. Yes. What started the ill-feeling?
A. Goodness knows.
Q. Was there any ill-feeling?
A. No, sir.
Q. Just a spontaneous outburst—George came in there and jumped onto you and commenced to fight?
A. Oh, no.
Q. What did he do? Why did he jump onto you?
A. Just because I opened my face about my brother selling the skins to cover his bet.
Q. What did you want to sell the skins or furs for?
A. Well, I didn't want to see my brother ask Holbrook for money.
Q. What did he want money for?
A. He was going to put up the money to wrestle John Anderson.
Q. And you had said nothing to George Matheson at all?
A. Not then; no, sir.
185 Q. Not a thing?
A. No, sir.
Q. No conversation between you and he?
A. No, sir.
Q. How long had you been in there—just came in?
A. Yes, sir.
Q. And he just came in there and struck you while you were talking about the furs?
A. No.
Q. Well, what did you mean to say?
A. He didn't strike me until after I opened my face and was telling Gus to sell the furs, and that made George mad.

Q. Made him mad because you told Gus that?

A. Yes, sir; I said I would stand my half and we would sell the skins.

Q. And that made George mad?

A. Yes, sir.

Q. And you hadn't had any conversation or trouble with him before that day?

A. No.

Q. Then you got into a fight, you and George?

A. Yes, and my brother parted us; "break away," he says, "if you're going to fight go outside."

Q. And he separated you?

A. Yes, sir.

Q. How soon did he strike you again?

A. As soon as I backed away from the bar to take off my braces.

Q. And then he struck you again?

A. Yes, sir; he poked his finger in my eye and my brother says "Damned if I can stand that," and shoved me aside.

Q. Then he got George down and was beating him and told him to holler enough?

A. He says "When you've got enough, squeal."

Q. Did George squeal?

186 (Objected to as immaterial. Objection overruled.)

Q. As a matter of fact, George wasn't able to squeal, was he?

A. Oh, indeed he was.

Q. Wasn't George unconscious on the floor when they took your brother off him?

A. No, sir.

Q. You're sure of that?

A. Yes, sir.

Q. Just as sure of that as anything else you have sworn to here to-day?

A. Yes, sir.

Q. Now, whereabouts in this saloon—this part of the diagram here marked "No. 1" represents the saloon, does it?

A. Yes, sir.

Q. Now, whereabouts in this saloon did this trouble take place? Just point it out to the jury; take this pencil.

A. Where it first started?

A. Yes, sir; where you were standing when he first struck at you?

A. The place where he first struck me?

Q. Yes; this being the bar here.

A. This is supposed to be the door?

Q. Yes, sir.

A. Well, first we landed right here—this is supposed to be the right of the door?

Q. No, sir; that's the counter.

A. This is the bar?

Q. Yes, sir.

A. Now, just about here; he was over here and I was right about here.

Q. At the place marked "No. 1"—point marked "one?"

A. Yes, sir.

Q. Now, then, after you were next separated, then where did
187 the next encounter take place?

A. This is the stove?

Q. That square mark there.

A. That was just about there when my brother, where he punched Matheson—right there.

Q. Near that square marked "B?"

A. Yes, sir.

Q. About how far is that from the stove?

A. That wouldn't be more than six feet.

Q. About five or six feet from the stove?

A. Yes, sir.

Q. Mark that point "2" where the second encounter took place. That's where the last fight between them was had?

A. Yes, sir.

Q. Now, after you were separated what occurred?

A. When—the last?

Q. Yes; now after your brother and George were separated what occurred then?

A. Well, Penrose said he was going to close up.

Q. Who was in the saloon at the time besides yourself, your brother, and George?

A. And George? There was Mr. Lake, and Penrose——

Q. Anybody else?

A. Yes, sir; John Anderson—let's see—yes, John Anderson, and—God, I can't think of his name——

Q. Was Ben Norval there?

A. Well, sir, I can't swear to that.

Q. Was Ed Mack there?

A. Yes; Ed Mack was there, and Mr. Taylor.

Q. You don't know whether Norval was there or not?

A. I couldn't exactly swear to that.

Q. Didn't you tell Mr. Clegg he was there?

A. Yes; I believe I did.

188 Q. Now you're not certain?

A. Well, he was there all right.

Q. Do you know whether he was there immediately after this trouble took place—was Holbrook there?

A. Yes, he was there.

Q. Was he there during the time your brother and George had the fight?

A. Yes, sir.

Q. Was he there afterwards?

A. Well, after he says come up to the bar and have a drink——

Q. Who was it separated them?

A. Well, there was nobody there a littlw while after.
Q. What did George do when your brother quit beating him?
A. Well, Penrose said he was going to lock up and——
Q. I asked you what George did?
A. He just laid there.
Q. How long?
A. O, about two seconds.
Q. Then what did he do?
A. He sat in the chair.
Q. Who sat him in the chair?
A. Why, McRae and Penrose.
Q. He didn't get up himself and set down in the chair?
A. No, sir.
Q. Did you see the condition of his face when he got up, to see whether he had been badly beaten?
A. No, I didn't look at his face; he had his head down.
Q. He sat lopped over in the chair, didn't he?
A. With his head down, like that [illustrating].
Q. How long was that after the scrap or fight?
A. When he was sitting in the chair?
Q. Yes.
A. About three minutes, I should guess.
Q. Well now, then, you all went out of the saloon, did you?
189 A. Yes, sir.
Q. Did Penrose go out, too?
A. No, sir.
Q. He remained there all the time?
A. Yes, sir; until supper time.
Q. That was about supper time when the fight happened, wasn't it?
A. Not exactly.
Q. Do you know how long Penrose remained in the saloon after the other fellows went out?
A. No, sir.
Q. Don't you know as a matter of fact that he wount out and left George in there unconscious?
A. No, sir.
Q. You don't know anything about that?
A. George wasn't as bad as all that.
Q. Well, where did you go then?
A. I sat on the bench outside.
Q. Well, how long?
A. I can't tell you.
Q. Well, I didn't suppose you could tell to the minute how long it was.
A. Well, I must have sat out there five or ten or fifteen minutes.
Q. And at the end of the ten minutes your brother had come back to take you to supper?
A. No, sir.
Q. Then where did you go?
A. Over towards Kendall's saloon.

Q. What did you go over there for?
A. O, just went over there——
Q. To get something to drink, I suppose?
A. Yes, I had a drink over there.
Q. More than one?
A. We had one there.
190 Q. You don't know whether you had any more or not?
A. I wouldn't swear to it.
Q. Well, how long did you remain there at that place?
A. Well, it wasn't very long; I couldn't say just how long we did stay.
Q. Half an hour you think?
A. Not in the saloon.
Q. Well, in and about the saloon?
A. We wasn't in the saloon a half hour.
Q. What time did you go to supper that evening?
A. Supper time was a little after six o'clock.
Q. Where did you take your supper that evening?
A. Holbrook's.
Q. Who else took dinner there besides yourself that evening?
A. There was John Anderson, Ben Norval, and Billy Taylor, and Fred Owens, Ed Mack, Mr. Lake, and my brother, and me.
Q. Did Penrose say anything about where George was while he was at supper that night?
A. I didn't hear him.
Q. How long was Penrose there from the time he first came to the time this shooting took place?
A. Well, he just had his supper and went back.
Q. Well, how long did that require, about?
A. Well, sir, I don't know—I couldn't say.
Q. Was he there an hour altogether, from the time he went to dinner until he went back?
A. No; I wouldn't say he was away an hour.
Q. Well, how long was it, as near as you can judge?
(Objected to as immaterial and not cross-examination.)
The COURT. It is connected with the transaction—I will permit it. Objection overruled.
Mr. DILLON. Can you tell anything about how long he remained there?
191 A. It must have been a little over a half hour, I guess.
Q. Now, then, how long was it after you finished your supper before you saw George coming, or before some one exclaimed and said they say George coming?
A. About fifteen or twenty minutes.
Q. Who was it called out and said "There comes Matheson," or words to that effect?
A. Fred Owens.
Q. Fred Owens. Now you may look at this map or diagram and at that part of the diagram marked in pencil "2" and state what

part of that building this represents that you were occupying at the time the shooting took place?

A. It was in there.

Q. In this compartment with a circle in the center marked "Table"—that's where you were sitting?

A. Where it took place?

Q. Yes.

A. No; that's the stove.

Q. Yes; this marks the location of the stove here?

A. It was right back in here.

Q. There is a partition that runs through there?

A. No, sir.

Mr. CLEGG. That is just a beam across the ceiling.

Mr. DILLON. The post office is in one corner, the sink in the other, and you were sitting back of the stove?

A. Standing up back there.

Q. Standing up back of the stove?

A. Yes, sir.

Q. And where was your brother?

A. My brother, he was sitting.

Q. Near the table?

A. No; he was sitting down here, right there [indicating].

Q. Between the couch and the table?

A. Yes, sir.

192 Q. He wasn't sitting on the couch?

A. No; he was sitting on a chair.

Q. Between the couch and the table?

A. Yes, sir.

Q. And when Owens called out "Matheson is coming," about that time Matheson opened the door?

A. Yes, sir.

Q. What did he do when he first came in the door? Did you see him when he first came in?

A. I seen him.

Q. What did he do? Stop and look around, or say anything?

A. Well, Mr. Lake ran right in front of him; he stopped and looked around and he got—I don't know whether he got his eye on Gus, but he made a straight line for where my brother was sitting.

Q. Did he say anything when he came in?

A. I didn't hear anything there then.

Q. Did he stop when he first got inside of the door?

A. Yes, sir.

Q. For how long?

A. O, I don't know exactly how long.

Q. Well, just state approximately.

A. Well, he didn't stop near a minute.

Q. Did you see him with the gun in his hand when he came in?

A. Not then; no, sir.

Q. When was the first time you seen it in his hand?

A. When my brother got his hand hold of it.

Q. And when he came in your brother jumped up and made a run towards him?

A. He was coming for my brother.

Q. Your brother started for him?

A. Yes, sir.

Q. And he met him about what point—point out on this diagram [witness points]—about this point where the arrow is near the table?

193 A. This is the door—there?

Q. This is the door—your brother was sitting here, according to your statement—this is the table?

A. That's the table.

Q. Marked table; yes?

A. My brother met him right here some place.

Q. This is the line, this dotted line along here, we will suppose, shows the line along which George walked, and he met him right about the end of this dotted line—isn't that where the shooting occurred?

A. Yes—yes, sir.

Q. It is about half way between—it was as near the door, or nearer, than where your brother sat, was it not?

A. Where my brother sat?

Q. Yes; at the time George first came in?

A. O, yes, yes.

Q. Now, then, who did you say stopped George at the door?

A. Mr. Lake got right in front of him.

Q. Well, he didn't get hold of him?

A. No; I don't think so.

Q. You don't know whether he did or not?

A. I don't know; no, sir.

Q. Well, George got by them?

A. Yes, sir.

Q. And the first you saw of the gun your brother had him by the wrist—after that you saw the gun in his hand?

A. Yes, sir; just saw that much of it.

Q. That's the first you saw of it?

A. No, sir.

Q. And you don't know what, if anything, occurred after the shooting took place, so far as George is concerned?

A. After the killing was done?

Q. Yes.

A. George went out then.

Q. You don't know what occurred to George or what he did after that—you stayed with your brother?

A. Yes, sir.

194 Q. How long before you saw George after that?

A. The time they was taking him down, taking him down to the landing where the poling boat was.

Q. How long was that after this occurrence?
(Objected to as immaterial. Overruled.)
A. O, about five days—four or five days.
That's all.
Mr. CLEGG. No redirect; that's all.

195 FRED OWENNING, witness, called on behalf of Government, being first duly sworn, testified as follows on—

Direct examination by Mr. CLEGG:

Your first name is Fred?
A. Yes, sir.
Q. How old a man are you, Mr. Owenning?
A. Thirty-six.
Q. Where do you live at present?
A. Fairbanks, at the present time.
Q. Where did you live in May of last year?
A. Up Chicken Creek.
Q. What's your business?
A. I'm a miner.
Q. How long have you been engaged in mining up there?
A. Well, just that summer of 1908; I came there about the 4th of February, or the first week of February.
Q. Do you know where this place called Chicken Creek town is located up there?
A. Yes, sir.
Q. Do you know where Struck's saloon is located in that community?
A. Yes, sir.
Q. Were you present there on May 24th, 1908?
A. Yes, sir.
Q. Are you acquainted with the defendant, George Matheson?
A. Yes, sir.
Q. Were you acquainted with one Gus Lawless in his lifetime?
A. Not very much; I saw him up there; got acquainted with him some up there.
Q. Well, you know him to see him?
A. Yes, sir.
Q. And did you know Joe Lawless?
A. Yes, sir.
Q. Did you see Matheson on Chicken Creek on May 24th, 1908?
A. Yes, sir.
Q. Whereabouts, Mr. Owenning, did you see him that day?
A. Well, in the morning I seen him in Struck's saloon.
196 Q. Did you see him in the afternoon?
A. I saw him about half-past six in the evening.
Q. Where did you see him at that time?
A. Well, it was right after supper, about half-past six.
Q. Where did you see him—where was he I asked?

A. Oh—I saw George Matheson pass the window.
Q. What window?
A. Of the house where we set.
Q. Of what building?
A. Of the road-house building.
Q. Conducted by Holbrook?
A. Yes, sir.
Q. The building itself belonged to Struck & Van Hook?
A. Yes, sir.
Q. Had you had dinner at that time?
A. I had supper.
Q. About half-past six in the evening?
A. Yes, sir; half-past six.
Q. Where did you have your supper?
A. I had supper at Holbrook's there.
Q. This same place?
A. Yes, sir.
Q. In the same building you are speaking about?
A. Yes, sir.
Q. And when did you see Matheson—you said after supper?
A. Yes, sir; after supper we went out in the post-office department.
Q. Can you refer to that diagram there marked "Exhibit A," and the diagram No. 2 thereon, and state whereabouts you were in that neighborhood when you saw Matheson?
A. I was sitting on the couch, the end of the couch, and I seen Matheson pass.
Q. Point out to the jury where it was?
A. I was right on the end of the couch here, and I seen Matheson coming past that window and Gus Lawless was up in here some place, and Mr Lake was around here—this table was more out here than it is here.
197 Q. Probably a smaller table, was it?
A. Yes; a round table, and John Anderson was around the stove, and Gus Lawless was in here.
Q. You mean Gus or Joe?
A. Joe Lawless—and Gus Lawless was in here.
Q. What was Gus Lawless sitting on?
A. On a chair.
Q. About how far from you?
A. Couldn't have been over about this distance, between you and me now.
Q. Which window did you see Matheson out of?
A. The east window.
Q. The front window?
A. He passed the window and I says "look out."
Q. How fast was he coming?
A. A good fast walk.
Q. And what did you say?

A. I says "look out, there comes George Matheson."

Q. Who were you talking to?

A. To Gus—and I hadn't any more than said it when George Matheson came in the door.

Q. Which way did that door open, do you remember?

A. It opened to the right.

Q. And what happened after he came in there?

A. When he came in I saw a gun in his right hand and Gus Lawless and everybody was to their feet when he appeared, and Gus Lawless jumped right in front of him and as he got in front of him he shot out to the right.

Q. Who did?

A. George Matheson, and it hit the wall right above the window there——

Q. Whereabouts on this plat?

A. [Indicating.] Right there.

Q. How high from the ground, the first one, where it struck?

A. About five feet or five and a half, and it passed right

198 between Lake and I.

Q. Between Lake and you?

A. Yes, sir.

Q. You had got up from the couch?

A. Yes, sir.

Q. Where had you started for?

A. Kind of towards the door.

Q. In the direction of Matheson?

A. Yes, sir.

Q. And what happened after that?

A. Well, the second shot, Gus Lawless he grabbed his wrist and he turned around and he shot the second time, he held the gun right down back of him and George pulled the trigger and shot again, and I thought the bullet must have hit him in the side, but it must have grazed his head because he fell to the floor——

(Counsel for defendant moves to strike the answer as to what he thought.)

The COURT. It may be stricken.

Mr. CLEGG: Just tell what you saw, and don't add anything as to what you believe or what your opinion is.

A. Well, I saw him shoot anyway.

Q. The second time?

A. Yes, sir; and Gus Lawless fell down.

Q. Immediately?

A. Yes, sir; fell right down to the floor.

Q. How—forward, backwards or sideways?

A. He fell down forward on his right wrist kind of, and he still had hold of Matheson's gun and George Matheson pulled loose and stood over him and shot him in the back of the head—and then George held the gun up in the air.

Q. Just illustrate to the jury how Lawless fell down there?

A. Well, he fell just about like that [illustrating] and he had hold of George Matheson's gun and George pulled loose from him and he stood right over him like that [illustrating] and shot him right in the back of the head.

199 Q. Did you observe Gus Lawless' body afterwards?

A. I saw it afterwards; yes, sir.

Q. What was his condition, was he alive or dead?

A. He was dead.

Q. How soon afterwards did you examine him?

A. I think it was two days afterwards.

Q. State to the jury who was in the room when you made the remark that Matheson was coming.

A. Well, Gus Lawless was in front of me here, and Mr. Lake was sitting over here to my right on a chair——

Q. Which way was he facing?

A. Lake was facing Gus.

Q. And who else was there?

A. John Anderson was there, and Joe Lawless back of the stove——

Q. Anybody else in the room?

A. I don't remember.

Q. How long is that room, about?

A. It's about 14 x 20.

Q. Sit down Mr. Owenning. Did you notice any marks about the head of Gus Lawless after the first or second shot?

A. Not then; no, sir.

Q. Did you notice where the second shot lodged?

A. The second shot lodged up in the ceiling.

Q. What in?

A. In a rafter—not exactly a rafter, but it was a 2 x 6 running across the room.

Q. In about what position is that in with reference to the locality of the stove?

A. Well, right back of the stove.

Q. How far back of it?

A. Well, it was about three feet back of the stove.

Q. About where in that rafter with reference to the center of the room, or the side?

200 A. Towards the center.

Q. Was anything said there after Matheson came into the room?

A. No, sir.

Q. Not a word?

A. No, sir.

Q. How long did it take this to happen, what you have described to the jury?

A. Well, not over five seconds anyhow, I think.

Q. Did you notice how Lawless came to fall down the first time, Mr. Owenning?

A. Well, right after the second shot he fell down.

Q. Right after the second shot? You didn't see any cause for his falling down there at that time?

A. No, sir.

Q. And in what direction was this gun pointed with reference to his head when it exploded?

A. The point was sticking up just like that [illustrating].

Q. In front of him—in front of his head?

A. He had hold of his wrist like that, and it was pointed up like that.

Q. By his side?

A. Yes, sir; and——

Q. And Lawless had his head towards the right?

A. Yes, sir.

Q. Did you see this revolver in the hands of Matheson when he came in?

A. Yes, sir.

Q. What sort of a revolver was it?

A. Well, it was a short revolver.

Q. Anything peculiar about it that you could describe to the jury?

A. Well, the way the handle was.

Q. Would you recognise it if you saw it, do you suppose?

A. Yes, sir; I think I could.

Q. [Handing witness revolver.] Just hold that down; there is a shell in it. Hold it down.

201

A. That looks like the gun.

Q. Looks like it? Well, can you say it is the gun?

A. Well, it looks just like the one he had.

Q. All right. Now, we would like to offer that in evidence——

Mr. DILLON. I think the shells had better be removed.

(Mr. Crossley and bailiff remove shells.)

Mr. CLEGG. Do you know anything about guns, Mr. Owenning?

A. No, sir.

Q. Do you know what caliber that is?

A. It looks like a thirty-eight.

Q. What sort of a gun is it?

A. It's a Bulldog action.

Q. Now, these shells have just been taken out here by the district attorney in the presence of the court and the jury. Will you state to the jury how many loaded shells are there and how many empty ones?

A. One loaded and four empty ones.

(The gun is offered in evidence as an exhibit. No objection. Marked "Plaintiff's Exhibit B.")

Q. Did you see Matheson after this shooting, immediately?

A. Well, I went out just after the third shot, after he shot the third time; went out and went up in front of Kendall's place.

Q. Kendall's?

A. And I saw George come out about a minute or two after me; and he told the crowd "I guess I'm in for it."

Q. That was after you saw him come out of where?

A. Struck's road house.

Q. And he also come down to Kendall's?

A. Yes, sir.

202 Q. How many men were there now, in front of Kendall's?

A. I don't remember just how many there were.

Q. Whereabouts were you?

A. I was right down in front of Kendall's myself.

Q. Did anybody walk down with George from the house?

A. I didn't notice anybody—no sir; nobody.

Q. He came down alone, did he?

A. Yes, sir.

Q. Where did he take up his position then?

A. He stopped right in front of the crowd on the sidewalk, and I went to my partner's cabin.

Q. What did he say there at that time?

A. He says: "I guess I'm in for it."

Q. Did anyone say anything to him in reply?

A. I went right away to my cabin.

Q. Is that all he said—all that you heard?

A. Yes, sir.

Q. How far is Kendall's place from Struck's saloon?

A. About fifty or sixty feet.

Q. What condition did he appear to be in at the time—did you notice him particularly?

A. Well, I suppose he must have been mad.

Q. Never mind what you suppose; state whether he appeared natural or normal to you, or otherwise? How did he appear at the time he made that remark?

A. Well, as I always met him before, only that his face was in bad shape.

Q. Did you notice anything different in his actions or manner at that time than you ever did before?

A. No; I didn't notice any difference.

Q. Just about the same as usual?

A. Yes, sir.

Q. What was the matter with his face?

A. His right eye was swollen, and his lip was swollen.

Q. Which part of his lip?

A. Upper part.

203 Q. And his right eye was a little what?

A. Well, it was swelling considerably.

Q. Was it black?

A. It seemed to be, yes.

Q. Do you know what happened him?

A. Sir?

Q. Did you know what caused that?

A. Well, during the scrap.
Q. Do you know what caused it?
A. Yes, sir.
Q. Were you there at the time?
A. No, sir; I wasn't up there.
Q. Well, how do you know then?
A. What I heard.
Q. What you heard—yes. We don't care for that.

Cross-examination by Mr. DILLON:

You don't know anything about what took place down at the saloon?
A. No, sir.
Q. What made you call their attention to his coming; had you heard they had trouble down there?
A. Well, I heard they had trouble.
Q. What was his appearance when he came in the door as to his mental excitement and that sort of thing?
A. He came in angry.
Q. He appeared to be excited?
A. Yes, sir; he seemed to be.
Q. Did he say anything?
A. Didn't say anything.
Q. Did anyone else say anything?
A. I didn't hear anybody; no, sir.
Q. What did he do when he first came in?
A. He had the gun in his right hand.
Q. I didn't ask you what he had—what did he do?
A. He looked over towards Gus Lawless.
204 Q. And before he did anything Gus Lawless started for him?
A. Yes, sir.
Q. Started quick—fast?
A. Yes; pretty quick.
Q. Where did they meet?
A. They met about four feet in front of the door.
Q. Now, this is the entrance door right here [indicating on plat]?
A. Yes, sir.
Q. And Gus Lawless was sitting over at the other side of the table near the couch?
A. Yes, sir.
Q. And as soon as Matheson came in the door Gus started for him, didn't he?
A. Yes, sir.
Q. And met him about four feet in front of the door?
A. Yes, sir.
Q. And no shots were fired until he met him?
A. No, sir.
That's all.

205 ROBERT T. PENROSE, called on behalf of Government, being first duly sworn, testified as follows on—

Direct examination by Mr. CLEGG:

What's your business, Mr. Penrose?

A. Mining, principally, in this country.

Q. Where have you been living the past few years?

A. The last—since 1896 I have been—from 1896 to 1900 I was living in British Columbia.

Q. Well, the last two or three years?

A. The last five years on Chicken Creek.

Q. Are you acquainted with George Matheson, the defendant in this case?

A. Yes, sir.

Q. Did you know Gus Lawless in his lifetime?

A. Yes, sir.

Q. Are you acquainted with Joe Lawless?

A. Yes, sir.

Q. Whereabouts did you live on Chicken Creek during the month of May, 1908?

A. I had a cabin up the creek a little ways. I lived by myself.

Q. On what creek?

A. Chicken Creek.

Q. Do you know where there is a saloon there known as Struck's saloon?

A. Yes, sir.

Q. Were you working for him in any capacity on the 24th day of May, 1908?

A. On the 23rd day of May, 1908, Henry Struck wanted to go to Steel Creek, and he employed me for two or three days until he returned.

Q. Were you in the saloon on the 24th day of May?

A. Yes, sir.

206 Q. And was Gus Lawless?

A. Yes, sir.

Q. And Joe Lawsless?

A. Yes, sir.

Q. And George Matheson?

A. Yes, sir.

Q. Did you see them engage in any conversation there?

A. No; I didn't pay much attention to their conversation at all.

Q. When did you see them there—what time?

A. Well, Joe Lawless was there all day, and I didn't notice Gus Lawless until later in the afternoon.

Q. Did you see any difficulty there the afternoon of that day?

A. Yes, sir.

Q. State to the jury in your own words just what occurred there at that time?

A. It was about half past four, I should judge, or thereabouts that George Matheson and Joe Lawless started arguing about wrestling.

I was behind the bar and talking to somebody in front of the bar, and I didn't pay much attention to it until they started to talk pretty loud and I told them—I says, "I don't want any fighting in here"; that was before they fought at all. I says, "You better go outside"—just like that, and the first thing I knew they were fighting.

Q. Who was?

A. Joe Lawless and George Matheson.

Q. And then what took place there?

A. Well, Gus, his brother, separated them, and I thought it was all over with.

Q. Now go back a little and tell the jury what took place there between Joe Lawless and George Matheson?

A. Well, they had a little scrap for a minute; I haven't got a very clear recollection about it.

207 Q. There had been some difficulty there that you knew nothing about—that it?

A. It was something about wrestling, but I wasn't paying any attention to it—I have heard all about it since.

Q. Don't state anything you heard; just state what you saw there and that's all. Now, what took place after Joe Lawless and George Matheson had some difficulty there?

A. Well, Gus Lawless he came in and separated them, and I thought it was all over with.

Q. Did he say anything?

A. I don't remember.

Q. Did you?

A. I told them in the first place if they wanted to fight they should go outside.

Q. Well, afterwards?

A. No; I don't remember that.

Q. Well, go ahead.

A. Well, the first thing I knew Gus Lawless and George Matheson were fighting.

Q. Whereabouts did that take place?

A. Aroun*g* back of the stove. And he knocked George Matheson down and Joe was around there, too, with his brother—I couldn't say whether they both hit him or not—but he knocked him down and thoroughly pounded him on the floor.

Q. Who did?

A. He was pounding him on the floor and I came out and two or three of us pulled him off.

Q. How many men were in there?

A. O, there must have been seven or eight.

Q. Besides the Lawless brothers and George Matheson?

A. Yes, sir.

Q. And yourself?

A. Yes, sir.

Q. They were all around the stove there together?

A. Yes, sir.

208 Q. And what else happened?

A. Well, after we got them pulled apart I told them to clear out, that I was going to close up.

Q. Did you close up?

A. Yes, sir.

Q. And did they all go out?

A. Yes, sir.

Q. What did you do?

A. I went out and got some water and came in and washed George Matheson's face off.

Q. You left the saloon?

A. Yes, I left.

Q. Did you leave him in there?

A. Yes, sir; Scott Holbrook came in and he says we better carry him to the hotel, and I says no, we better leave him here until we have supper.

Q. Did you have any talk with him?

A. No, I did not.

Q. Where did you leave him when you went out?

A. When I went out I left him on the floor

Q. Left him lying on the floor?

A. On the floor. I washed his face and took the blood out of his mouth—there was clotted blood in his mouth.

Q. And what did you do after that?

A. Well, we had a few minutes to wait before supper, and I went over there and washed and came back to the saloon.

Q. Yes?

A. And I went in and took hold of him and shook him and I says "you can't stop here"—I wanted to get him up off the floor and put him in the bedroom at the back of the saloon, and he murmured something; I couldn't make out what he said at all.

Q. Well, did you leave him there finally?

A. Yes, sir; I picked him up and he was perfectly limp, and I let him lay there while I went and had supper, and after supper—well, before supper I had a conversation with Gus Lawless before we went in.

209 Q. Did you go ever and have supper?

A. Yes, sir; before we went in to supper I had a conversation——

Q. I'm not asking you about that; did you go in and have supper?

A. Yes, sir.

Q. How long were you at supper?

A. I couldn't say that; I don't suppose it was any more than fifteen or twenty minutes after we started to eat.

Q. How long did it take you to eat?

A. I never looked at the time.

Q. Can't you state approximately?

A. I never looked at the time, but I thought it was between most likely about three-quarters of an hour until after supper, the whole thing.

Q. And after supper what did you do?
A. After supper I went out, and then Ben Norval came out with me.
Q. From the eating house?
A. Yes, sir.
Q. You had supper in Struck's?
A. Yes, sir.
Q. And then what?
A. And I went to the saloon, and William Taylor, I met him upon the veranda, on the sidewalk in front of the saloon, and I says: "I must go and get George out of here."
Q. Who else was there?
A. Ben Norval.
Q. And William Taylor and yourself?
A. Yes, sir.
Q. This was in front of Struck's saloon?
A. Yes, sir.
Q. And what did you say?
A. I says I must go in and get George out of this, and when I went in George Matheson was behind the bar; Ben Norval followed me in and——
Q. Which part of the bar was he at?
A. Well, towards this end of the bar.
210 Q. The front end you mean?
A. Yes; he was about here somewhere [pointing to map].
Q. Just show the jury on this map here—this is supposed to be the bar-room and this is the front.
A. Well, I should say it was about there [indicating].
Q. Well, what is "there"; what do you mean?
Mr. DILLON. About where did you say?
A. About here.
Q. How long is that bar, about?
A. It must be 20 feet.
Q. And this is about a quarter of the way from the front end of the bar?
A. Yes.

By Mr. CLEGG:

What was he doing, Mr. Penrose?
A. Well, the bar was high and I didn't see the six-shooter in his hand.
Q. What occurred after you went in there?
A. But he flashed the gun up and shot it off in the floor and he says: "I guess that will do."
Q. Who was there at that time?
A. Ben Norval, and Taylor, and myself.
Q. What did he do after that statement?
A. Well, I tried to get him to put it down and he came from behind the bar and I walked towards the end——
Q. Which way did he go?

A. He came around here—walked around here to the front door.

Q. Yes; then what took place there?

A. And Taylor was there in front of him, and Taylor says he couldn't get out there.

Q. You were behind him at the time, were you?

A. Yes, sir.

Q. And where was Holbrook?

A. Holbrook?

Q. I mean Ben Norval.

A. He was standing about the back somewhere; I couldn't say.

Q. Did he say anything to him?

211½ A. Well, they spoke, but I couldn't say what they said.

Q. Well, what happened after that?

A. Well, Matheson walked to the back of the saloon; I talked to him and tried to get him to put that gun down; I was pretty frightened myself.

Q. What at?

A. Him having that revolver in his hand.

Q. And what did he do?

A. He went to the back door and pulled the pin out of the staple and went out.

Q. Why were you frightened of him?

A. Because he had a loaded six-shooter in his hand.

Q. Was that all?

A. Yes, sir.

Q. Well, he pulled the staple out and went out the back door?

A. Yes, sir.

Q. What did the rest of you men do?

A. I was right on his heels then, and directly he got outside of the door Holbrook was out at the back part of this house here——

Q. What was he doing?

A. At the wood-pile or the clothes-line there, and I yelled to Holbrook and says, "Hurry up, for God's sake; George has a six-shooter," and George came around then and about here [indicating] he met Ed Mack——

Q. Well, where were you people after that—following him?

A. No; we stopped there; I went through the saloon and around the other way.

Q. What did the other two men do?

A. I believe they did the same thing.

Q. You came out in front and saw what Matheson was doing on the side-walk after that?

A. No.

Q. Where did you see him again then?

A. I went through the saloon and along the side-walk to-

212 wards the house and when I seen him again he was just getting up; I heard three shots and I saw him just as he was getting up from him the last shot, off of Gus Lawless.

Q. What about the last shot when he was getting up, did you see that?

A. Yes; I was just in the door.

Q. What position was he in with reference to Lawless when you saw him?

A. He was just getting off him.

Q. Well, just show the jury what position Lawless was in and what position Matheson was in?

A. Lawless was laying with his face down and Matheson must have been over him and he was just getting up.

Q. You was standing in the door?

A. Yes, sir; I was standing in the door.

Q. Where were you when you heard the first short?

A. I couldn't say; just going over there.

Q. Were you close to the building at the time?

A. Walking on the sidewalk.

Q. Well, how far do you say those buildings are apart; the eating house and post office building, and the saloon building, Mr. Penrose?

A. O, seventy-five to a hundred feet.

Q. And did you see Matheson after that?

A. Yes.

Q. Where?

A. All the crowd of us went over in front of the saloon.

Q. What saloon?

A. Henry Struck's saloon.

Q. Where was Matheson?

A. He was there, too.

Q. Where was he about—where abouts was he?

A. Well, he was standing right—we was standing here about between the warehouse alley, about here in front.

Q. Well, what did you do?

213 A. Well, I heard some conversation about lynching and I opened the door of the saloon and told them to come in, and he came in and I set him in a chair inside of the saloon.

Q. Did you have any conversation with him?

A. Yes; I asked him if he realized what he had done—I says "You have killed Gus Lawless."

Q. What did he say?

A. He says: "I suppose it is all off with me."

Q. How did he appear at that time?

A. Well, he was pretty wild looking all right.

Q. Pretty what?

A. Wild looking.

Q. Is that all you noticed about him?

A. Well, I can't say that he was the worse for liquor.

Q. You don't think he was drunk?

A. No, sir; he had been drinking around all day, but I don't think he was drunk.

Q. Did you notice any marks on his face?
A. Yes, sir.
Q. Where were they?
A. Well, his eye was swelled up and his mouth had been pounded pretty well.
Q. Which eye?
A. The left eye.
Q. What was the matter with his mouth?
A. Well, where they had been hitting him, I suppose.
Q. Well, how did it look?
A. Just like a man being hit on the mouth—blood on it.
Q. Still blood on it, was there?
A. I washed it off.
Q. I'm asking you now about that time when you were in the saloon there with him?
A. It was swelled up a little.
Q. What was the matter with his left eye?
A. It was swelled up.
Q. How much?
214 A. O, just a little. Of course in two or three days it looked worse than it did then.
Q. Did he look as wild when you sat him down in the chair when you came back, as he did when he went out with the gun in his hand?
A. No, sir.
Q. What was the difference?
A. I don't think he was as wild.
Q. Which time?
A. Well, his general appearance wasn't.
Q. How is that?
A. By his general appearance I don't think he was as wild, as before.
Q. You think he had cooled down a good deal from what he was when he went out?
A. Yes, sir.
Q. Considerably?
A. I should judge so.
(Objected to as leading. Objection sustained.)
Q. You knew Matheson pretty well?
A. Yes, sir.
Q. You were playing cards with him the night before?
A. Yes, sir.
Q. Just look at this revolver here marked "Plaintiff's Exhibit B" and state whether or not you ever saw that before?
A. Yes, sir.
Q. Where?
A. I saw it at the hearing in front of Commissioner Brady.
Q. Did you see it before that?
A. No, sir.

Q. You knew where it came from?
A. Yes, sir; not the exact spot maybe.
Q. Do you know whose it is?
A. I presume Henry Struck's.
Q. I'm asking if you know—didn't you see it in his saloon?
A. No, sir; the first time I ever saw that to the best of my knowledge, was at the preliminary trial in front of Commissioner Brady.
215 Q. You saw Matheson flourish this revolver behind the bar?
A. Yes, sir; I didn't know what one it was.
Q. You heard it go off?
A. Yes, sir.
Q. You knew then that it was a revolver?
A. I knew he had it in his hands, but I couldn't identify it.

Cross-examination by Mr. DILLON:

You say you saw this fight back of the stove between Gus Lawless and George?
A. I saw them fighting, yes, sir.
Q. Did you see the fight start?
A. No, I can't say I did see it start.
Q. What was the first thing you saw as you remember it now?
A. Well, you see, I thought it was all over with.
Q. I know, but when you saw them fighting the second time—between George and Gus?
A. Well, when I seen them the second time Gus Lawless—that I seen anything of it—was pounding him up.
Q. Was George standing up or was he down at the time?
A. George was down.
Q. And what was his position?
A. He was laying on his right side.
Q. Didn't you say on direct examination that you saw Gus Lawless knock him down—I understood you to say he knocked George down?
A. Gus Lawless?
Q. Yes?
A. I couldn't say as to that.
Q. I'm not sure whether you said that or not—I thought you did. How long did they continue to fight there?
A. Well, I got out from behind the bar and told them to pull him off.
Q. Was George doing anything?
A. No, he was laid out on the floor.
216 Q. What was his condition when you pulled Gus Lawless off of him; was he conscious or unconscious; or, in other words, was he out?
A. He was knocked out, to the best of my belief.
Q. Did he say anything?
A. No, sir.
Q. How long did he lay on the floor before you came back to him after they separated them?

A. How long?
Q. Yes.
A. I turned them all out of the saloon then.
Q. Then you went back to George?
A. I went and got water and washed his face.
Q. And how long did that take, as near as you can tell?
A. I can't say—five minutes I should say. I went to Holbrooks and got a cloth and warm water.
Q. How far is that from the saloon?
A. 75 or 100 feet.
Q. You put the people out of the saloon and then went to Holbrook's?
A. Yes, sir.
Q. Got a cloth and warm water?
A. Yes, sir.
Q. And came back?
A. Yes, sir.
Q. And washed his face?
A. Yes, sir.
Q. What was his condition then; able to get up?
A. No; he was on the floor.
Q. Did he say anything?
A. The only word I heard him say when I bathed his face was "Lawless."
Q. Just murmured that?
A. Yes, sir.
Q. Did he have any use of his faculties or limbs at that time?
A. No, sir.
Q. How was he lying?
A. On his right side.
Q. When you left him he was in the same position?
A. Yes, sir.
Q. Did you try to set him up or get him to get up?
A. I don't recollect that.
217 Q. Did you say anything to him?
A. Not right then; not at that time that I remember.
Q. What did you do after you washed his face?
A. Well, just before that Scott Holbrook wanted to carry him over to the hotel.
Q. Yes; we will get at that later on. After you washed his face what did you do?
A. I went out.
Q. Now, you say Holbrook wanted to carry him into the office?
A. Yes, sir.
Q. That was before you went to supper?
A. Yes, sir.
Q. Before the people went out of the saloon?
A. Yes, sir; about that time.
Q. Why wasn't that done?

A. It wasn't done because I thought it best to leave him there; there was quite a house full.

Q. Had he been beaten considerably?

A. Yes, sir.

Q. How large a man was Gus Lawless?

(Objected to as not cross-examination. Objection overruled.)

A. Why, about my size, I should judge.

Q. What was his weight, would you say—was he a heavy-set, strong man?

A. Yes; over a hundred and sixty pounds I should think.

Q. Pretty husky, strong man?

A. Yes, sir.

Q. Young man, quick and active?

A. Yes, sir.

Q. How long had you known him?

A. O, a year or so.

Q. Do you know now what caused the trouble between he and George, except what you have heard?

A. Yes, sir; I do.

Q. Do you know of your own knowledge?

A. Just what he told me.

Q. What who told you?

A. Gus Lawless.

218 Q. You had a conversation with him?

A. Yes, sir; while I was washing for supper.

Q. After the fight and before you went to supper?

A. Yes, sir; in the post-office part of the building.

Q. What did Gus Lawless say about it?

A. I said: "You had no business when a man was down like that pounding him on the floor like you did," and he said, "Well, I was going to make him squeal for his meanness," and I said, "You had no business to pound him up like that," and he said "I would'nt have touched him at all only he tried to poke my brother's eyes out."

Q. Then you went away and left him lying on the floor unable to get up?

A. Yes, sir.

Q. That was what time of day as near as you can tell?

A. I should judge about twenty minutes or half past five.

Q. This fight then must have occurred about five o'clock?

A. About that.

Q. You left there after you had first put the crowd out, and locked the door?

A. Yes, sir.

Q. Went to Mrs. Holbrook's and got warm water?

A. Yes, sir.

Q. Came back and washed George's face?

A. Yes, sir.

Q. He was still unconscious?

A. Yes, sir.

Q. Then you put your things away?
A. Yes, sir; and I went back again.
Q. You went out after you went and washed his face?
A. Yes, sir; went out and throwed the pan out.
Q. How long did you stay the second time?
A. I went right back again.
Q. And he was laying in the same position?
A. Yes, sir.
Q. Did he say anything then?
219 A. I took hold of him and kind of shook him and I says, "You can't stop here," and he muttered something; I couldn't understand anything he said, and I took hold of him and was going to put him on the bed and he was perfectly limp.
Q. Then what did you do?
A. I left him there and went over to supper.
Q. And that was about half past five in the evening?
A. Well, it would be getting on that way, yes.
Q. And how long were you away to supper before you came back?
A. Of course, really, it would all be guess work with me.
Q. Well, estimate it as nearly as you can.
A. O, I should say twenty minutes or a half hour.
Q. Do you know what time they usually had supper?
A. I think usually at six o'clock.
Q. Do you think it was about six o'clock that night?
A. Well, there was quite a crowd around there and it was a holiday you know.
Q. How far away from the saloon is it to where you had to go to get supper?
A. It was about a hundred feet.
Q. And you went up there and washed and had your supper?
A. Yes, sir.
Q. And went back in company with Norval?
A. Yes, sir.
Q. And on the way you met Taylor?
A. Yes, sir.
Q. And then you went back to the saloon?
A. Yes, sir; me and Taylor.
Q. Unlocked the door and went in?
A. Yes, sir.
Q. And then you met George behind the bar?
A. Yes, sir.
Q. Which way was he facing, front or back?
A. I dont remember.
Q. As a matter of fact wasn't he facing the back bar, trying to wash some blood out of his mouth?
A. No, sir.
Q. He was pretty shaky at that time was'nt he?
A. Yes, sir.

220 Q. Did he appear to—what was his appearance as to his having control of his faculties or of his mind?

A. O, he was in a wild condition, I considered.

Q. He was? And he picked up a revolver he got from somewhere?

A. Yes, sir.

Q. And he fired that into the floor?

A. Yes, sir.

Q. Then he attempted to go out the front door and Taylor stopped him?

A. He did; yes, sir.

Q. And then he went out the back door?

A. Yes, sir.

Q. You followed him back to the back door?

A. Yes, sir.

Q. You didn't follow him around the building?

A. No, sir.

Q. The course that he pursued from the saloon, starting from the back bar, is this black, dotted line here, until he arrived at the spot marked here where the tragedy took place?

A. Yes, sir.

Q. How far did you follow him when you went to the back door?

A. Just to the outside.

Q. What was the last you saw of him when you went to the back door?

A. He was talking to Ed. Mack. I just followed clear of the building somewheres.

Q. And he was talking to Ed. Mack about here [indicating on diagram]?

A. Yes, sir.

Q. About a quarter ways down on the sidewalk between the warehouse and the road house where they took supper?

A. Yes, sir.

Q. Did he say what he was going to do when he left?

A. The only words I remember that he said was "I guess that will do."

Q. Didn't he say anything when going out the door?

A. No, sir.

Q. When you saw him talking to Ed. Mack, how long did
221 you see standing there?

A. Just a short time.

Q. What did you do then?

A. I yelled to Holbrook.

Q. He was where?

A. Back of the kitchen part of the hotel.

Q. Did Holbrook say anything or answer you?

A. No. I says: "For God's sake hurry up, George has a six-shooter."

Q. Then what did you do?

A. I went back around and went to the house.

Q. Back through the front door—did you close the saloon when you went out?

A. Yes, sir; just closed the door.

Q. Did you leave anyone in the saloon?

A. No, sir.

Q. How far down the sidewalk were you, as well as you now remember, when you heard the first shot?

A. I couldn't say—on my way there somewheres on the sidewalk.

Q. Now, where were you when you heard the last shot fired?

A. He was just getting up——

Q. No, no; where were you?

A. I was right at the door.

Q. Here is the entrance door right here?

A. I was right about here [indicating on plat].

Q. Outside the door?

A. Yes, sir.

Q. Was there anyone between you and he?

A. There was quite a crowd there.

Q. Crowded around there?

A. Yes, sir.

Q. Could you see very distinctly what was occurring?

A. I saw him raise up, yes; he was just getting up from shooting.

Q. You don't know what took place between them after George entered the eating house?

A. No, sir.

Q. Then after that, what did you do?

A. After that we all went out. I didn't——

Q. You with the rest of them all went out?

A. Yes, sir.

222 Q. Where did you go?

A. Over in front of the warehouse.

Q. Down the side-walk to the warehouse?

A. Yes, sir.

Q. About to that place?

A. Yes; about where your stick is.

Q. About the alley opposite the saloon?

A. Yes, sir.

Q. Did George go down with the crowd?

A. He was about the first one, I think.

Q. He was down there when the crowd got there?

A. Yes; we all went together.

Q. After there was some talk of threatened violence outside you asked him to come into the saloon?

A. Yes, sir.

Q. And he came in?

A. Yes, sir.

Q. And sat down?

A. Yes, sir.

Q. And what did you say?

A. I asked George "Do you realize what you have done? You have killed Gus Lawless."

Q. What did he say?

A. He says "It is all off with me."

Q. What was his appearance then, wild-looking?

A. Not as wild looking as before he went out

Q. He was all knocked out you said?

(Objected to as calling for the conclusion of the witness.)

Q. What was his mental condition?

A. Well——

Q. Just describe his appearance as to his disposition or mental condition at that time, not in comparison with before, but with his normal nature or disposition.

A. Well, he went down quite quietly.

Q. Well, was he excited?

A. No; he was not.

Q. He appeared to be entirely rational and knew just what he was doing, as far as your judgment is concerned?

A. O, I couldn't say as to that.

Q. Now, you say his face had been beaten up?

A. Yes, sir.

Q. His eye was closed?

A. All swelled up; yes.

223 Q. Swelled up until it was closed and turning black?

A. Yes, sir.

Q. And his lip was swollen?

A. Yes, sir.

Q. And still bleeding?

A. I couldn't say as to that.

Q. How long did he remain there in the saloon at that time?

A. At that time?

Q. Yes.

A. Only just a few minutes.

Q. Then what was done with him?

A. George Estabrook was appointed to take charge of him.

Q. Do you know what was done with him after that?

A. Yes, sir.

Q. Where was he taken to?

A. To George Estabrook's house.

Q. How long was he held there before he had a preliminary hearing, do you know?

(Objected to as immaterial and not cross-examination. Objection sustained. Exception.)

Redirect examination by Mr. CLAGG:

I understood you to say, Mr. Penrose, in speaking of Matheson's movements towards the back of the saloon that he ran, or walked?

A. When he was going out the back door?

Q. With the gun; yes?

A. He went pretty fast.
Q. Well, how fast?
A. O, he walked quick.
Q. How far were you behind him?
A. I was pretty close to him—close enough to get hold of him only I was afraid.
Q. Now, you stated to Mr. Dillon that when you came back from supper he was behind the bar and that he looked wild—is that what you stated?
A. Yes, sir.
224 Q. Now just describe to the jury what you mean by that Mr. Penrose?
A. Well, from the beating he had it would make anybody look wild, of course.
Q. That was what you meant when you stated he looked wild, was it?
A. No; I think he was really wild. If I didn't think he was really wild, I would have certainly taken hold of him and taken the six-shooter from him.
Q. Why didn't you do that then?
A. Because I thought if anybody laid hands on him he was liable to shoot him.
Q. You knew him pretty well, then?
A. Yes, sir.
Q. You had seen him in that state of mind before?
A. Yes, sir; I had seen him scuffle before that.
Q. He was just mad, wasn't he?
A. Yes, sir.
That's all.

225 JOHN E. ANDERSON, called on behalf of United States and first duly sworn, testified as follows on—

Direct examination by Mr. CROSSLEY:

Were you sworn, Mr. Anderson?
A. Sir?
Q. Were you sworn in this case?
A. Yes, sir.
Q. What is your name?
A. John E. Anderson.
Q. Where do you live?
A. On Chicken Creek. I live in Fairbanks at the present time.
Q. Now, I wish you would speak up plainly, so the jury can hear you.
A. Well, I have a bad cold. I will do the best I can anyway.
The COURT. Talk as loudly as you can.
Mr. CROSSLEY. Where were you living on May 24th, 1908?
A. On Chicken Creek.
Q. What is your occupation?
A. Miner and prospector.

Q. Do you know where Mr. Henry Struck's saloon is on Chicken Creek?

A. Yes, sir.

Q. Do you know where the roadhouse is run by Mr. Holbrook and belonging to Henry Struck?

A. Yes, sir.

Q. I wish you would look at that plat there on the board and state to the jury whether or not that represents pretty well the relative position of those buildings.

A. Yes; this is the saloon that belongs to Struck.

Q. Number one is Henry Struck's saloon?

A. Yes, sir.

Q. And this is the roadhouse?

A. No. 2 represents the roadhouse; yes, sir.

Q. Where was the post office—in which of those buildings?

A. In Mr. Struck's building the roadhouse was in over here.

Q. Where were you that day, the 24th day of May, 1908?

A. I was right there, sir.

226 Q. When were you in Henry Struck's saloon that day?

A. I was in Henry Struck's saloon, O, between three and four o'clock, something like that—I didn't look at the clock.

Q. You think it was about that time?

A. Yes, sir; about that time.

Q. Did you see Mr. George Matheson that day?

A. Yes, sir.

Q. When did you see him?

A. I seen him several times during the day.

Q. Well, in the afternoon, about the time you speak of?

A. Well, I seen him in Kendall's place.

Q. Then where did you see him next?

A. The next time I seen him in Henry Struck's saloon.

Q. And where did you see him next?

A. The next time I seen him was in the road house.

Q. Where did you take supper that evening?

A. In Holbrook's road house.

Q. About what time?

A. Well, somewheres around about six or seven o'clock.

Q. Between six and seven. What did you do after you had supper, Mr. Anderson?

A. We went in the post office and sat down talking.

Q. Show to the jury on this plat where you were sitting in the post office after supper?

A. I was sitting right here [indicating].

Q. In front of or back of the stove?

A. Back of the stove.

Q. Who was in there—yourself and who else?

A. I can't tell for sure who was in there; there was several fellows in there; Fred Owenning and Ben Norval and Billy Taylor was there, and myself, and Joe Lawless and Gus Lawless.

Q. And who else?
A. And Lake.
Q. Mr. Lake?
A. Yes, sir.
227 Q. Just a moment—so you were sitting around there after you came out from supper?
A. Yes, sir.
Q. Where was Gus Lawless sitting?
A. I couldn't tell you; I didn't pay any attention to it.
Q. Well, while you were sitting there?
A. Well, he was walking back and forth on the floor when we came out from supper, talking to us all.
Q. You didn't notice where he was sitting later?
A. No, sir.
Q. Tell the jury what happened there; if any particular events happened there go ahead and tell the jury and tell of your own free accord just how it came about?
A. I was sitting there, and Joe Lawless he was standing right in front and we was talking about the scrap he had before that and things like that and I didn't know anything before the door opened and George Matheson came in.
Q. Did you hear anything before he came in?
A. I thought somebody hollered: "Here comes George."
Q. Who was that, do you know?
A. No, sir.
Q. Someone hollered, Here comes George?
A. Yes, sir.
Q. Did anyone speak to Gus Lawless or speak his name?
A. Not that I remember.
Q. All right; you say George came in the door—then what?
A. Well, I couldn't see nothing.
Q. You weren't blind?
A. But I couldn't see because the crowd was between men and the stove; I was sitting down and I couldn't see over the crowd between me and the door.
Q. Well, did you hear anything?
A. Yes; I heard the shots fired.
Q. One?
A. Yes, sir.
Q. Did you hear any shots fired after that?
A. Yes; I heard two after that.
228 Q. Did you see who was doing the shooting?
A. No; not at the first or second shot.
Q. Did you see who fired the third shot?
A. Yes, sir.
Q. Who was it?
A. George Matheson.
Q. George Matheson, the defendant here?
A. Yes, sir.

Q. Who did he fire that shot at?
A. Gus Lawless.
Q. Where were you standing at that time?
A. I was right within three feet of him then.
Q. Can you just represent to the jury what position Gus Lawless was in when Matheson fired the third shot?
A. Well, as far as I recollect he was on his elbow down like this [illustrating]. I'm quite sure.
Q. Show the jury, Mr. Anderson?
A. Get down?
Q. Yes, sir; just how he was.
A. Well, down on his knees and elbow as far as I remember.
Q. Where was Matheson?
A. He stood right back of him.
Q. And what did he do?
A. Well, when I was up close he pulled away and pulled the gun down and shot.
Q. Shot Gus Lawless?
A. Yes, sir.
Q. Shot him where?
A. In the neck.
Q. Turn your back to the jury and show where he pointed the revolver?
A. [Turning back to jury and indicating.] About here.
Q. What did you do?
A. I grabbed him from behind like this [illustrating].
Q. Grabbed who?
A. George Matheson.
Q. Did anybody else grab him?
A. No, sir.
Q. What were you trying to do?
A. Take the gun from him.
Q. Now, when he fired the third shot in the back of the head of Gus Lawless, what did Lawless do?
A. He flattened right down on the floor.
229 Q. Do you know how long he lived?
A. No; I couldn't tell.
Q. Did you see him after he was dead?
A. Yes, sir; I did.
Q. Where?
A. I seen him laying on the floor after I went out on the sidewalk and was back, and he was laying on the floor; and the next time I saw him they had him out on the sidewalk and was just carrying him over to——
Q. Well, sit down now. Did you ever see the revolver that Matheson had in his hand?
A. I did.
Q. Would you recognize it if you saw it?
A. I might; I don't know.

Q. Just look at that revolver there marked "Plaintiff's Exhibit B" [handing to witness] and state to the jury whether that is the same revolver?

A. No; I could not.

Q. Couldn't say?

A. No; not for sure.

Q. Does it look anything like it?

A. Yes, sir; it looks like it, the same one; I don't know whether it is the same one or not.

Q. But it looks like the same one?

A. It looks like the one.

Q. Who took the revolver away from him?

A. I was trying to get it way from him, and Billy Taylor got it out of his hand.

Q. William Taylor took it?

A. Yes, sir.

Q. Then what did Matheson do?

A. I let him go and he walked outside.

Q. Now, after he fired the third shot there as you say in the back of the head of Gus Lawless what did he do—Matheson?

A. Why, Matheson, we tried to take the gun away from him and after we got the gun we turned him loose and he walked out.

230 Q. Well, what resistance, if any, did he make to your taking the revolver?

A. O, yes; he was trying to prevent it.

Q. He resisted your taking it away from him?

A. Yes, sir.

Q. Did he say anything?

A. No, sir; not that I heard.

Q. Did Gus Lawless say anything?

A. No, sir; I didn't hear him say anything either.

Q. I mean after George Matheson came into the room?

A. No, sir; not a word that I heard.

Q. Will you state to the jury about how long a time it took from the time George Matheson came into the post-office building until you got the gun from him—about how long?

A. Very short time.

Q. How many seconds or minutes?

A. I couldn't tell; it might have been fifteen or twenty seconds and it might have been only four or five.

Q. The shots were fired close together?

A. Yes, sir; close together; because as soon as I heard the first shot I made a lunge for him and before I got to where he was the three shots were fired.

Q. The second shot or the third?

A. The third.

Q. The third shot?

A. Yes, sir.

Q. Were you back of George Matheson or in front of him when the third shot was fired?

A. Within about three feet——

Q. Back of him?

A. Rather to the side of him.

Q. How close to the stove was that?

A. Right close to the stove that was.

Q. Tell the jury which way Lawless's head was facing when Matheson fired the third shot?

A. Right up between the stove and where I was sitting when the first time he came in.

231 Q. Can you show about where his head was at the time the third shot was fired?

A. [Pointing to map.] Right here his head was, pointing this way; I was sitting here and Matheson stood right behind him there.

Q. Right behind him?

A. And I went around him this way and came up to him here.

Q. You went around to the left of the stove from where you were sitting to come around to Matheson?

A. Yes, sir.

That's all.

Mr. DILLON. No cross-examination.

232 SEPT. 9, 1909—10 A. M.

HENRY STRUCK, witness called on behalf of the Government, and being first duly sworn, testified as follows on—

Direct examination by Mr. CROSSLEY:

Now speak out plainly, Mr. Struck, so the jury can hear—what is your name?

A. Henry Struck.

Q. Where do you live, Mr. Struck?

A. Chicken Creek.

Q. Where were you living along about the 23rd or 24th of May, 1908?

A. Chicken Creek—same place.

Q. And what was your business at that time, Mr. Struck?

A. Storekeeper, saloon, and doing some mining.

Q. I wish you would look at the plat we have there, Mr. Struck, and which is marked "Plaintiff's Exhibit A," and state to the jury whether or not that is an approximately correct representation of the Struck & Van Hook saloon and the road house owned by you and rented to Mr. Holbrook marked Nos. 1 and 2 respectively thereon—what is this over here marked No. 1?

A. That is the saloon and store.

Q. Now, what is this part marked No. 2?

A. That is the road house.

Q. Those represent approximately the relative positions of the buildings there?

A. Yes, sir.
Q. And the rooms, the way they are located?
A. Yes, sir.
Q. And the location of the bar?
A. Yes, I think that's correct.
Q. Where were you on the morning of the 23rd of May, 1908, Mr. Struck?
A. I was at home the morning of the twenty-third.
233 Q. State to the jury whether or not you were there the whole day?
A. No, sir; I left there on the middle of the forenoon.
Q. Were you in the saloon or road house before you left?
A. Yes, sir.
Q. And about what time were you in the saloon, Mr. Struck, that day?
A. I was there about 8 o'clock in the morning—half past 8—something like that.
Q. State whether you were behind the bar at that time?
A. Yes, sir.
Q. Did you have any weapons around there at that time, and if so, what were they?
A. Well, there were several weapons there.
Q. Well, behind the bar?
A. Yes, sir.
Q. What were they?
A. Well, there was two shotguns at the end of the bar, and a rifle and a revolver at the other end.
Q. At which end was the revolver, Mr. Struck; show on that plat to the jury?
A. The revolver was laying right in there [indicating]; this was the gold scales here, and this is the washboard of the bar, and there was a shelf underneath the desk, and the revolver was on one side or other, I couldn't say which, of that partition.
Q. What kind of a revolver was it, Mr. Struck?
A. Just a cheap ordinary 38-caliber revolver, red-handled, and partly rusted.
Q. Thirty-eight caliber revolver?
A. Yes, sir.
Q. State what condition it was in?
A. Well, it was just barely fit to fire a shot out of it; it was in poor condition, it was partly rusted and was lying around there several years; I dont think it had been shot off.
234 Q. Had you done anything with it in the last few days preceding this time?
A. I had cleaned it up some probably two or three weeks before.
Q. State to the jury whether or not you would know that revolver if you were to see it.
A. Yes, sir; I would know it.

Q. Look at this revolver, marked "Plaintiff's Exhibit B" [handing to witness], and state whether or not that is the revolver.

A. Yes, sir; that is the revolver.

Q. That is the same revolver?

A. Yes, sir.

Q. Is that a five or six shooter, Mr. Struck?

A. Why, it's a five-shooter.

Q. Was it loaded or unloaded when you left it there the morning of the twenty-third?

A. It was loaded; I couldn't say it was loaded full, but it was loaded all but one cartridge, I'm positive of that—may be full.

Q. And it may have been loaded full?

A. Yes, sir.

That's all.

Mr. DILLON. No cross-examination.

235 EDWARD MACK, witness called on behalf of the Government, being first duly sworn, testified as follows on—

Direct examination by Mr. CROSSLEY:

You were sworn?

A. Yes, sir.

Q. What is your full name?

A. Edward L. Mack.

Q. Where do you live, Mr. Mack?

A. I am residing in this district at the present time; previously on Chicken Creek.

Q. District of Alaska?

A. Yes, sir.

Q. Where were you living on the 24th day of May, 1908?

A. I was living at Chicken Creek.

Q. On the 24th day of May, 1908, in the afternoon of that day, were you at any time in Henry Struck's saloon?

A. Yes, sir.

Q. Did any particular event take place in there?

A. Well, there was no particular event taking place outside of the fact we had congregated there that afternoon and was drinking and talking as we usually did; there was several of us standing at the bar talking and arguing, and an argument about this wrestling came up between Joe Lawless and the defendant and it was substantially the same as Mr. Lawless testified here yesterday.

Q. What was the condition of Joe Lawless at that time?

A. Why, he was under the influence of liquor at the time.

Q. Pretty full, was he?

A. Yes.

Q. Then after this happened in the saloon where did you go then—first, about what time was it?

(Objected to as indefinite.)

Mr. CROSSLEY. He spoke about the discussion.

The COURT. This refers to the controversy just at that time.

Mr. DILLON. I would like to have it a little more definite.

236 Mr. CROSSLEY. You will have an opportunity to make it just as definite as you like. About what time was that?

A. When this controversy was taking place?

Q. Yes, sir; in the saloon?

A. Between four and half past four in the afternoon.

Q. Go on and detail to the jury just what happened there, Mr. Mack, in your own language.

A. As I said before, the defend'nt and Joe Lawless had an argument regarding their merits as wrestlers and Joe Lawless was standing with him in a position with his back right there by the bar and George Matheson was in front of him and his brother was over at the counter or in that vicinity, and in the argument they became angry at one another and the defendant rushed at Joe Lawless and caught him by the nose or in that vicinity and he went to the floor. At that time Gus interfered, and he says, "If you fellows want to fight or wrestle you go outside." What was the cause of Gus Lawless interfering with the defendant at that time I don't know, but the next thing I knew they were engaged in fighting and finally wound up back of this stove as indicated on this map, and after a few brief moments Mr. Holbrook and I and several others parted them and Penrose ordered us out of the saloon and thereon I went to supper.

Q. You and Mr. Holbrook and who else was there?

A. Mr. Penrose and Struck.

Q. You don't mean Mr. Struck was there?

A. No; not Struck, come to think of it—but several others, I don't know their names.

Q. Did you know any of the parties there?

A. O yes; I knew all of them.

Q. State whether or not Mr. Lake or Norval or Mr. Taylor were there at the time?

237 A. Well, Mr. Lake was in the saloon at the time of this fight, I don't know whether Norval was or not, I don't remember.

Q. How many were present there all together?

A. There must have been at least eight or ten.

Q. Now after this took place, you say Mr. Penrose told you all to get out of the saloon and closed up?

A. Yes, sir.

Q. Then where did you go?

A. I went to the roadhouse, being called by Holbrook for supper.

Q. Who was there to supper, do you remember?

A. Most all of those parties entered in this fight at the saloon, Taylor, Penrose, and the rest.

Q. Did you have supper immediately, or did you wait some time?

A. I went right to the table immediately.

Q. About how long were you there at supper?

A. O, I should judge twenty or twenty-five minutes.

Q. Right after you left the saloon did you go direct to the roadhouse where you had supper, or to some other place first?

A. No; that's right, I was standing—no; that's after I got back. After I left the roadhouse having supper I went up the sidewalk——

Q. Wait a moment. I mean after you left the saloon and Penrose asked you boys to go out and shut the door, did you go direct to supper or to some other place first?

A. I went right directly to the roadhouse.

Q. And Penrose was in there?

A. I didn't see him.

Q. You didn't go up to Kendall's saloon or roadhouse after you left there?

A. No; I did not.

Q. After having supper you came out into the post office?

A. Yes, sir.

238 Q. Did you tarry there any length of time?

A. No, I did not.

Q. Who did you notice there in the roadhouse at the time?

A. Well, all that was sommonsed here; Joe Lawless, and Gus Lawless, and Mr. Lake, and several others; I can't recall their names.

Q. Then, after you had your supper what did you do? Start in and tell the jury.

A. Shortly after I had supper I immediately left the post office and went down the sidewalk to the point indicated by a square on this sidewalk and I met the defendant coming around here [indicating on map] and he spoke to me.

Q. He spoke to you?

A. Yes; he says: "What shall I do?" or "What will I do?" and I tried to persuade him to go home.

Q. You say something to that effect—do you remember his exact words?

A. I don't—it was something to that effect.

Q. And you tried to persuade him—what was that?

A. Well, I says, "There is no use of going down there, you will get into further trouble."

Q. What did he say?

A. He didn't answer me; he turned around and started and I turned and saw Norval and Penrose somewhere in this vicinity back of this warehouse; Matheson had left them a few steps when they hollered, "Stop him; catch him; he has a gun on him."

Q. Where did he have his hands when you met him?

A. One hand on my shoulder and the other in his pocket.

Q. Which hand did he have in his pocket?

A. I don't remember; he had one hand on my shoulder and the other in his pocket.

Q. Do you remember on which of your shoulders he put his hand?

239 A. No, I don't. I think it was the right shoulder—I don't remember.

Q. Did he say anything at that time in regard to Lawless?

A. Where he met me here?

Q. Yes.

A. No, he did not.

Q. Didn't say anything about Lawless at that time?

A. Yes, sir.

Q. And you stated he better not go down there, to keep away from further trouble?

A. Yes, sir.

Q. Then what did he do?

A. Why, he ran down the sidewalk after Mr. Penrose and Ben Norval had called to me and I followed him within about half the distance between the warehouse and the roadhouse, when I heard three reports of the revolver; then I rather walked down within fifteen or twenty feet of the door when I met the defendant coming up this sidewalk; coming back again, and he was, I should judge, halfway between the warehouse and the post office when Holbrook came rushing out and called for assistance to pack out Gus Lawless.

Q. Did the defendant Matheson say anything to you after he came out there?

A. Yes, I think he did say something; I can't recall the exact words—"I have done it," or something like that.

Q. What?

A. "I have done it," or something like that.

Q. Did he say to whom?

A. No, he didn't mention any names.

Q. Then what did he do?

A. Well, at the time I met him there he was rolling a cigarette.

Q. Where did he go?

A. Up to the saloon.

Q. Did you go up there with him?

A. No, sir.

Q. Did you see him up there after that any time?

A. Only once.

240 Q. How long after that was it, Mr. Mack?

A. Oh, that was after we had taken the deceased, Gus Lawless, and put him in the warehouse.

Q. After that you say you saw him—what did he say, anything?

A. After when?

Q. After you had taken Gus Lawless and put his body in the warehouse?

A. No; he didn't say anything that I remember of.

Q. Where was that you saw him, Mr. Mack—the second time?

A. Why, he was standing right by the warehouse—somewhere between the warehouse and the saloon.

Q. Couldn't it have been in front of the saloon?

A. Yes; it was on the porch.

Q. And you didn't hear him say anything at that time?
A. No, sir; I did not.
Q. Did you see the body of Gus Lawless?
A. Yes, sir.
Q. Did you see any marks on his body?
A. Why, I noticed—I saw where the bullet entered the back of his head.
Q. Show the jury where it was.
A. Right at the base of the skull, as far as I remember [illustrating], right in the vicinity of here, and a slight powder burn on either the right or the left side, I can't remember distinctly; but there was a mark there of some description; we pronounced it a powder burn.
Q. When you say you met George Matheson near the warehouse, on the sidewalk there, how fast was he going?
A. Well, when I first met him he wasn't walking very fast.
Q. After he left you how fast did he go?
A. Why, he ran after the time he left me.
Q. Was that after these gentlemen, Norval and Penrose, had hollered at you?
241 A. Yes, sir.
Q. And he ran on down towards the roadhouse?
A. Yes, sir.
Q. What was the appearance of Mr. Matheson when you met him there, Mr. Mack?
A. Where; at the steps, on the sidewalk?
Q. Yes.
A. Why, he showed the marks of rather a severe beating; his eye was swollen and his mouth bloodshot.
Q. You said he was walking slowly, and what was his appearance otherwise—his facial expression?
A. Why, he seemed to be very nervous but composed; that is, he seemed to have full possession of his faculties, as far as I could judge.
Q. He seemed to know, you think, just what he was doing?
A. Yes, sir; seemed so to me.

Cross-examination by Mr. DILLON:

What effect, if any, did the hollering of those men, Penrose and Holbrook, have on the defendant, if any?
A. What effect?
Q. Yes.
A. I don't know as it had any effect on the defendant.
Q. He immediately left you?
A. Yes, sir.
Q. You said he was walking when he came up?
A. Yes, sir.
Q. Then it did have some effect on him?
A. I don't know as it did.

Q. It caused him to run, didn't it?

(Objected to as calling for the conclusion of the witness. Objection sustained. Exception.)

Q. He immediately started to run on their hollering?

A. Yes, sir.

Q. And ran down towards the other place?

A. Yes, sir.

Q. You saw him get this beating you speak about?

242 A. Yes, sir.

Q. And you noticed his condition as to how badly he was beaten at the time they separated them?

A. I didn't quite catch that.

Q. You noticed his condition as to how badly he was beaten at the time they separated them, he and Gus Lawless?

A. Yes, sir; I noticed it.

Q. What was his condition?

A. Why he was pretty badly beaten; he was in a dazed condition when I left.

Q. He was unconscious when they separated them?

A. I don't know; apparently he was.

Q. He remained lying on the floor?

A. Yes, sir.

Q. How badly was his face beaten?

A. Why, his eye was badly swollen, and there was, I believe, a cut on one of his lower lips.

Q. At the time you saw him last had his eye closed from the swelling?

A. It was closed, I think; very nearly, anyway.

Q. How long after—about what time of day did this last fight take place—I don't mean the occurrence at the roadhouse, but at the saloon between Gus Lawless and the defendant?

A. About half past four in the afternoon.

Q. What time did you have dinner at the roadhouse?

A. We usually had it at six.

Q. What time did you have it that evening?

A. I believe it was about six o'clock.

Q. You say you left the saloon immediately and went to the road house?

A. Yes, sir.

Q. How long did it take you to go up there?

A. Why, I don't think it took me over a minute.

Q. How long were you in the saloon after the fight started until you left there?

243 A. I was in the saloon during the progress of the fight and the argument, and then we were ordered out of the place.

Q. What time did he order you out of the place?

A. To the best of my knowledge it might have been half past four or later.

Q. Between five and half past five, would you say?

A. No, between half past four and five.
Q. A few minutes until five?
A. Well, I guess so.
Q. What time would you say you got down to the saloon after your dinner?
A. About seven o'clock.
Q. About what time was it when you met George at the square marked on the sidewalk here, as he left the saloon?
A. To the best of my memory it was nearly five.
Q. Before supper? The shooting took place before supper?
A. No, sir; it did not.
Q. You had supper about six o'clock?
A. Yes, sir; I think it was somewhere in that neighborhood.
Q. And you met him there at that place about five?
A. To the best of my knowledge it was somewhere around there.
By Mr. CLEGG. Did you hear the question that was asked you?
A. He asked if I was there at five o'clock.
Mr. DILLON. I asked you if you met George there at five o'clock in the afternoon?
A. Well, somewheres in that neighborhood; it was in the afternoon anyhow.
(Counsel for the Government objects on the ground that the witness very evidently does not understand the question, and it is unfair to let the answer stand.)
By the COURT. Do you understand what the question is?
A. Yes, sir; I thought I understood it.
By Mr. DILLON. You didn't see anything take place in the
244 roadhouse, did you?
A. No, sir, I did not.
Q. Where were you at the time you heard those shots?
A. About halfway between the warehouse and the roadhouse.
Q. On the sidewalk?
A. Yes, sir.
Q. Where did the—did the fight take place in the saloon back of the stove at this point marked on the map "B"?
A. Well, it started in this vicinity [pointing] and finally ended up back of the stove.
Q. Back of the bar near the stove?
A. Yes, sir; near this corner of the bar.
Q. How long had they been fighting before they were separated?
A. Not very long.
Q. Three, four, or five minutes?
A. I couldn't say.
Q. Did you see the fight start?
A. Yes, sir.
Q. Just describe the start of it.
A. Well, the fight, as I said before, was the outcome of an argument about wrestling.
Q. Just describe it.

A. And in the course of the argument Joe Lawless and the defendant became angry at one another and the defendant, George Matheson, rushed at him and grabbed him in the vicinity of the nose.

Q. That's the first fight?

A. Yes, sir.

Q. Just describe the last one, is what I meant.

A. It was merely a continuation of the first one.

Q. Occurring immediately afterwards?

A. Yes, sir.

Q. How much time elapsed between the two?

A. I don't remember—a very short time anyway.

Q. They were separated on the interference of Gus Lawless?

A. Yes, sir.

Q. And after they got into the dispute——

A. The intermission was very slight, because they started right in fighting after that.

245 Q. And when they started, what did Gus Lawless do?

A. Gus struck him several times, and had him on the floor back of the stove.

Q. Did you hear Gus Lawless say anything?

A. I don't remember.

Q. Did you see the first time Gus Lawless struck him?

A. Yes, sir.

Q. Where did he strike him?

A. In the head.

Q. What effect did it have—knock him down?

A. Yes, sir.

Q. Then Gus Lawless was doing what?

A. Well, Lawless was still striking him.

Q. Did he get down on top of him?

A. No, just on his hands and knees.

Q. Holding him with one hand and beating him with the other?

A. Yes, sir; I believe so.

Q. Where did he beat him, about the head?

A. I think on the head mostly.

Q. And who separated them?

A. Why, Holbrook and I interfered, and got Gus Lawless off of George.

Q. Did Gus say anything while he was beating him?

A. Not that I remember.

Q. Do you remember whether he said "Cry out when you've got enough!"

A. I don't remember.

Q. You heard that testimony of the witnesses?

A. Yes, sir.

Q. You never heard that?

A. No, sir.

Q. But you helped separate them on the floor?

A. Yes, sir.

Q. Well, that was about half past 4 or 5?
A. Yes, sir.
Q. And the shooting took place after supper?
A. Yes, sir.
Q. Now, if this fight took place between half past 4 and 5,
246 and the shooting didn't take place until after supper, you feel now that you occupied all of that time in going to your supper and walking back there, to bring this shooting down to between six and seven?
A. Well, of course I don't remember the time exactly.
Q. Your reason would tell you the time that it would consume to walk back and forth there.
A. Yes, sir.
Q. You must be mistaken as to the length of time that elapsed?
A. I may, perhaps; yes.
Q. It couldn't have consumed an hour and a half or two hours, could it?
(Objected to as argumentative. Objection overruled.)
A. Why, no; it couldn't consume two hours.
Q. It might have consumed an hour and a half?
A. About an hour and a half, anyway, I guess.
Q. Then when you say that after you had your dinner that you met the defendant at the point on the sidewalk that you have indicated at five o'clock——
A. On or about that time I said; yes, sir.
Q. And that was after you had your supper—you must be mistaken when you say you had your supper eat?
A. Yes, sir; I must be mistaken.
Q. You were somewhat excited at the time?
A. Yes, sir.
Q. And don't remember as well as if you hadn't been excited?
A. No, sir.
Q. And the occurrences are somewhat confused in your mind?
A. O, some of the details are, to some extent.
That's all.

Redirect examination by Mr. CROSSLEY:

You remember the general outlines as to what took place?
247 A. Yes, sir; I think so.
Q. If you said to Mr. Dillon that you saw him at five o'clock, where was it you met him?
A. It was at the point indicated on this plat.
Q. I thought you said it was after supper you met him?
A. Yes, sir.
Q. Well, have a minute ago you placed it at between half past four and five o'clock?
A. Yes, sir.
Q. And where did you see George Matheson at that time?
A. He was in the saloon.

Q. Then you didn't see him on the sidewalk there at half past four or five?

A. No, sir.

Q. And when you answered Mr. Dillon as to having met him there at five o'clock in the afternoon you may have made a mistake on that proposition?

A. Yes, sir; as to the time.

Q. That must have been between six and seven that you met him there?

A. Yes, sir; it was at supper time, anyway.

Q. After supper?

A. After supper; yes, sir.

Q. You think—you stated you think it was at least an hour and a half from the time the fight took place in the saloon until the shooting took place at the road house after supper?

A. I think so, to the best of my knowledge.

Q. Now, when you and Mr. Holbrook took charge of Mr. Gus Lawless there just state to the jury whether he made any particular resistance or not—was he willing to quit fighting when you requested him to and took him *him* away from there?

A. Well, he did offer a slight resistance.

Q. It was only slight?

A. Yes, sir.

Mr. CROSSLEY. That's all.

248 Recross-examination by Mr. DILLON:

You had to pull him off—he didn't quit when you told him to?

A. No, he did not.

Q. He kept trying to beat and strike Matheson until you got him away?

A. He didn't keep on beating him, but he was still over him.

Q. Well, endeavoring to—you took hold and pulled him away?

A. Yes, we did pull him off.

Q. Both of you—the two of you?

A. No, I was standing over Gus while Holbrook had hold of him, because his brother Joe was also trying to get him to stop.

Q. Matheson wasn't saying anything?

A. No, sir.

Q. After they were separated, what was the next thing done by the crowd in the saloon?

A. Why, the next thing was the order from Mr. Penrose to get out of the house.

Q. You heard the testimony of Mr. Joe Lawless, yesterday, when he said they all went to the bar after they were separated and had a drink? Did you notice whether anybody did that?

A. No, I can't remember of any one.

Q. If the crowd went up to the bar and had a drink you would be very apt to notice that?

A. I should think so, although I immediately got out.

Q. You think you would be likely to remember that?
A. Well, I didn't pay any particular attention.
Q. They all got out at the same time?
A. To the best of my knowledge they did.
Q. Good many of them did?
A. Yes, at least some of them.
Q. Where did they go to?
A. Some of them went to Scott Holbrook's road house, and some of them to Kendall's place.
249 Q. You didn't go to Kendall's saloon?
A. No, sir; I did not.
Q. How long after you got to the roadhouse did the others arrive there?
A. It couldn't have been but a short space of time.
Q. Then they all went in and had dinner?
A. Yes, sir.
Q. Did they eat at the same time you did?
A. Yes, sir.
Q. Mr. Penrose eat there at the time you were there?
A. There were several parties there, I don't remember.
Q. And after you ate your dinner you came out into the room known as the post office and sat down?
A. Yes, sir.
Q. How long had you been sitting there before you left?
A. I didn't sit in the post office at all.
Q. You left immediately?
A. Yes, sir.
Q. Had the others finished their dinner at the time you left?
A. No, sir.
Q. You don't know whether there was any one in the front room when you left or not?
A. Yes, sir.
Q. Who was there?
A. Joe Lawless, Mr. Owenning, Mr. Lake, and Mr. Anderson, and several others sitting there.
Q. Sitting in the front room when you came out?
A. Yes, sir.
Q. And you walked immediately down the sidewalk—what was the distance between the eating house and the saloon?
A. O, I should judge from 75 to 100 feet.
Q. This side of the warehouse?
A. Yes, sir.
Q. About fifty feet from the roadhouse?
A. No, sir; it was farther than that.
Q. How far would you say it was?
A. Well, 60 feet.
Mr. DILLON. That's all.
Mr. CROSSLEY. That's all.

250 WILLIAM D. TAYLOR, witness called by the Government and first duly sworn, testified as follows on—

Direct examination by Mr. CROSSLEY:

Q. State your full name.
A. William D. Taylor.
Q. Where do you live, Mr. Taylor?
A. Chicken Creek.
Q. Where were you living on May 24th, 1908?
A. I was living on Chicken Creek.
Q. Where were you in the afternoon of that day?
A. On Chicken Creek—at Struck's saloon.
Q. About what time did you go there, Mr. Taylor?
A. O, probably two o'clock in the afternoon.
Q. And how long did you remain there?
A. I stayed there until perhaps half past four.
Q. Was there anything happened there while you were there, Mr. Taylor?
A. A little fight; yes, sir.
Q. Just tell the jury what happened there.
A. Well; it must have been about four o'clock when I saw George Matheson take hold of Joe Lawless and throw him to the floor; and then Joe's brother, Gus, parted them, and says: "Go out doors if you fellows want to fight," and then he says, "I guess you don't want to fight, anyway." Then I took my eyes off them and I thought, of course, it was all over, and the first thing I knew I heard another racket further back in the saloon and just then I seen Gus Lawless rushing for George; he says, "I can't stand that; it isn't fair," and the next thing I saw George Matheson on the floor and Gus on top of him and in probably a minute I and two or three others went over and I stood over Gus and I told him to get off, and he says: "What
251 do you want," and I says, "You have gone far enough;" and he got up and stepped back and I walked away.
Q. Then what happened?
A. A few minutes after that we all went out of the saloon and I went home.
Q. Where was that?
A. Up the creek about five or six hundred yards.
Q. About what time was this when the trouble took place in the saloon, do you think?
A. I should say it was along, perhaps, half past four then, may be a little later.
Q. You went out after a few minutes and went home?
A. Yes, sir.
Q. And how long did you stay there?
A. I stayed there a few minutes; may have been gone fifteen minutes, and it may have been a little longer—anyway, I stopped a few minutes and talked with my cabin mate and then I came back again.

Q. Back where?
A. To the saloon where I took my meals.
Q. What saloon was that?
A. Let's see; Kendall's saloon.
Q. How far is that from the Struck & Van Hook saloon?
A. The two doors are about forty feet apart.
Q. In what direction?
A. It is north from the Struck saloon.
Q. In the opposite direction from the roadhouse?
A. Yes, sir; opposite directions.
Q. And you took supper?
A. Yes, sir.
Q. How long were you there?
A. Well, before that I went into Kendall's and Gus came in and he said he had hurt his hand, and I said, "I will get some arnica for you." So I went out and when I came back I didn't see Gus, so I came back down to Kendall's and stayed there a few minutes before I went to supper.
252 Q. How long were you in there then?
A. I might have been in the dining room a half hour.
Q. Then where did you go?
A. Out on the front piazza in front of the door, and I stayed there awhile and then walked down towards Struck's saloon and met Norval and Penrose coming up——
Q. From where?
A. Struck's roadhouse—and Holbrook just coming out from supper, and then I started to go back and Penn opened the door and stepped inside, and George Matheson called Ben in, and I followed him in.
Q. When you got inside what did you see and what happened?
A. When I got in the first I heard—I saw George Matheson standing behind the bar near the closed end next to the window——
Q. Show the jury on the plat where you saw him standing.
A. George was standing about here [indicating].
Q. Behind the bar?
A. Yes, sir.
Q. What was he doing? What was he saying, if anything?
A. He was standing there when I saw him, and when I got inside two or three feet and he held up the gun and says: "I guess that's all right," and fired it into the floor.
Q. Then what?
A. Then he came around towards the—went around the bar, you know, and came towards the front door to within about three or four feet of the door, and I was leaning against the door by that time, and he says: "Get out of the way, Bill; let me by," and I says: "You can't get out here," and he swung around and went for the back door.
Q. When he fired did anyone say anything?
A. Yes, sir; I told him to put that down.
Q. Did Penrose say anything at that time?

253 A. Yes, sir; both Penrose and Norval said something.

Q. What was the substance of it? Can you remember?

A. I couldn't tell you now.

Q. You told him to put that down?

A. Yes, sir; and he paid no attention to it, and then I went over to the counter on the opposite side of the room and leaned against the counter, and then I went over towards the door.

Q. What did you do when you went over there?

A. I leaned against the door.

Q. And did you say anything to the defendant, Matheson, at that time?

A. Yes, sir; I told him he couldn't get out, and he says: "Get out of the way, Bill, and let me out;" and I says you can't get out here, and he swung around instantly and started towards the back door.

Q. Did he have the weapon in his hand then?

A. Not in his hand.

Q. Where was it?

A. It must have been in his pocket.

Q. What did you and Norval and Penrose do?

A. We followed him out.

Q. Did you say anything more to him?

A. I did not.

Q. Did either one of the others?

A. I don't know now. When they got outside both of the men hollered to Ed Mack and then hollered to Holbrook.

Q. About where were you when they hollered?

A. Around the corner of this building right here.

Q. Can you show to the jury the course Matheson took from the time you saw him with the revolver in his hand over back of the bar until the last you saw of him? Just indicate it—tell the jury so we can get it in the record.

A. [Indicating.] Here is where he was behind the bar.

Q. Then which way did he travel?

254 A. He came out around the open end there towards the front door here, and then he turned around and went right straight to the back door here and around the corner you see, and around this corner around the warehouse, right past the side of it and up on to the sidewalk and from there——

Q. Who did he meet there?

A. He met Ed. Mack a short way, maybe ten feet from the steps, coming down on the platform from the warehouse out on to the walk—it was about ten feet to where Ed. Mack was standing.

Q. Was he stopped there?

A. He stopped there a second or two.

Q. Then what did he do?

A. He went right from there direct to the door of the roadhouse and in.

Q. Now, about where on that course were you men when Norval and Penrose hollered at Holbrook and Mack?

A. I believe we were about here (indicating).
Q. Around the corner of the saloon?
A. Yes, sir; about here, and Holbrook was about here.
Q. Do you know how long——
A. Now, Matheson was about here and he came along and he came up here.
Q. Did you say Holbrook was with you?
A. No.
Q. You meant Norval?
A. Yes, sir; Norval and Penrose.
Q. Now, from the time Matheson left the place at the bar there and came to the front door and then out the back door and up to this place where Mack was—how fast did he go?
A. He came right from behind the bar as a man would walk—fast—up to me where I stood by the door; and right back through the room—fast—and there was, I don't think, only a few minutes
255 or seconds—the whole thing—until he was outside of the back door.
Q. Until he came up to where Mack was did he keep up that same speed?
A. Yes, sir.
Q. And then what about it after that?
A. He stopped a second or two with Ed. Mack and from there he went pretty fast.
Q. Where?
A. Down towards the roadhouse.
Q. Well, what did you do then?
A. I followed him.
Q. Go on and tell the jury what you heard and what you saw and what you did.
A. Well, I was within a few feet of the door when I heard the first shot and was just at the door when the third shot was fired.
Q. How many shots did you hear?
A. Three.
Q. Then state what you did.
A. When I got inside I saw—well—Gus Lawless was on the floor and George Matheson was on top of him and John Anderson was almost on top of George when I got in.
Q. What did you do?
A. I took the gun out of George's hand and about then, we all walked out of the post office almost instantly, I think.
Q. What position was Gus Lawless in when you first saw him?
A. Kind of down on the floor with his head down and his knees pretty well straightened out.
Q. Face down or up?
A. Face downward.
Q. Where?
A. On the floor.
Q. How near the stove?

A. Is this the stove? He was pretty close to the stove right here.
Q. In the roadhouse—in the post-office part?
A. Yes, sir; the post-office part of the roadhouse.
256 Q. Then what did you do when—what did Matheson do when you took the gun away from him?
A. He got up and walked towards the door.

Cross-examination by Mr. DILLON:

From the time this fight took place down in the saloon until the time you heard those shots fired, in your judgment, how much time elapsed?
A. Perhaps an hour and a half.
Q. You think it was as long as that?
A. Yes, sir.
Q. From the time the fight took place until you went back to the saloon Matheson had been in the saloon hadn't he—did you see him after you separated him and Gus Lawless?
A. Yes, sir; just a few minutes I saw him before I left the saloon.
Q. What was his position at that time?
A. He was sitting in a chair like that.
Q. Sitting in a chair?
A. Yes, sir; when I went out.
Q. No; I mean after you got there?
A. I don't—I didn't see him there.
Q. Did you talk to him?
A. No, sir.
Q. Did you hear him saying anything after they were separated?
A. I did not.
Q. And you didn't see him after that until you seen him behind the bar?
A. No.
Q. What was his appearance when you saw him behind the bar?
A. He had one eye swollen up and his lip swollen.
Q. How badly swollen?
A. Well, the eye was pretty nearly closed and the lip was swollen pretty badly.
Q. Any blood on his mouth?
A. A little cut on his lip.
Q. Was the blood issuing or oozing from it to any extent?
A. No, not at that time.
257 Q. What appeared to be his mental condition?
(Objected to as calling for the conclusion of the witness.)
The COURT. He may describe the appearance of the defendant at that time.
Mr. CROSSLEY. Yes, as to his actions; but he can't testify what his mental processes were.
The COURT. Just describe the appearance of the defendant at that time.
A. There was nothing very unusual about his appearance, except those bruises on his face and eye.

Mr. DILLON. I wasn't asking about his physical condition, I asked about his mind—whether he was excited?

A. Yes; he looked to me determined.

Q. Determined?

A. Yes, sir.

Q. Was he excited?

A. He didn't look to me so.

Q. Did you ever have any trouble with George Matheson?

A. No, sir; never.

Q. How long have you known him?

A. Five or six years.

Mr. DILLON. That's all.

Redirect examination by Mr. CROSSLEY:

In the saloon there, when Mr. Gus Lawless and George Matheson had trouble, did he say anything there?

A. I heard something in the argument about wrestling.

Q. I mean, Mr. Taylor, about the time you took Gus Lawless away, did any one say anything about the fight?

A. I heard Gus Lawless say "When I have trouble with a man I always tell him I'm coming."

Q. Did any one else say anything beside that?

A. No, not that I remember of.

Mr. DILLON. No recross-examination.

258 BEN NORVAL, witness called by the Government, being first duly sworn, testified as follows on—

Direct examination by Mr. CLEGG:

State your name?

A. Ben Norval.

Q. Where do you live, Mr. Norval?

A. On Chicken Creek, Alaska.

Q. Where did you live about the 24th of May, 1908?

A. Chicken Creek.

Q. What is your occupation, Mr. Norval?

A. Farming and trapping.

Q. Farming and trapping?

A. Yes, sir.

Q. How long have you lived up there, Mr. Norval?

A. About five years.

Q. Were you acquainted with Gus Lawless?

A. Yes, sir.

Q. During his lifetime—you knew him how long?

A. About eleven months—yes; about thirteen months.

Q. Are you acquainted with the defendant George Matheson?

A. Yes, sir.

Q. This is the defendant here, Mr. George Matheson?

A. Yes, sir; that's George.

Q. Did you see those two men on May 24th, 1908?

A. Yes, sir.

Q. You say you lived in the neighborhood of Chic*ek* Creek; can you tell the jury where Struck & Van Hook's saloon is?

A. Yes, sir; on Chicken Creek, bench claim No. 7, I believe.

Q. Look at the plat marked "Plaintiff's Exhibit A" and state to the jury whether that is an approximately correct representation of the Struck saloon, the roadhouse, and the sidewalk along there?

A. Yes, sir.

Q. That's a fairly good illustration?

A. Yes, sir.

Q. How far is the saloon and roadhouse apart, Mr. Norval?

A. Well, it is 65 or 70 feet, possibly further.

Q. Where were you that day, at any time in the afternoon, Mr. Norval?

259 A. I was at the saloon of Struck & Van Hook.

Q. You were in that saloon?

A. Yes, sir.

Q. About what time?

A. Well, I was in the saloon pretty much all day.

Q. Where were you in the afternoon about four o'clock—between four and five?

A. In the saloon of Struck & Van Hook.

Q. Did you see anything out of the ordinary take place there?

A. Yes.

Q. Just tell the jury distinctly so they can all hear what it was that took place there, Mr. Nor*avl*?

A. Well, there was some little fighting or "scrapping," as you call it, going on in the saloon. First between the defendant, George Matheson, and the witness, Joe Lawless—just a little sort of a saloon scrap like. We thought nothing of it because it is a common occurrence among the working men and fellows that drink. And the deceased, Gus Lawless, undertook to separate them, and did separate them. But they renewed their fight again and the deceased attempted the second time to separate them, and those two people, the defendant, Matheson, and the deceased, Gus Lawless, they became involved in the fight, and the defendant got considerably the worst of it in that fight, so much so that the by-standers separated the two by taking the deceased, Lawless, away and off of the defendant, Matheson. Then by the assistance of a party or parties the defendant was seated in a chair and the bartender of the place said he was going to close up the place. Now, I don't remember, it appears to me like I took a drink—I don't know as any one else had a drink before we left, but we left the saloon of Van Hook and went to Kendall's saloon 60 or 70 feet further up the creek. Then we hung out——

(Objected to as not responsive to the question.)

260 Mr. Crossley. Go right ahead and tell what happened up to the time you went back to the roadhouse to get your supper and afterwards too?

A. That's all I know about in the saloon.

Q. Well, go ahead now and tell the jury where you went after that.

(Objected to as encumbering the record and wholly immaterial.)

The COURT. It will at least indicate the time, and assist the witness in designating and locating the approximate time of the occurrences that followed. Objection overruled. (Defendant excepts.)

Mr. CROSSLEY. Go ahead and tell the jury?

A. As the bartender asked us to leave the house, that he was going to close up we did; I left the defendant, George Matheson, and the bartender, Penrose, in the house, and we all left—as far as I could see there was no one else left. We all went over—part of us anyhow—we all lived around there and sometimes there was several men in the saloon and sometimes but few, but there was no other left, but the bartender, Penrose, and the defendant, Matheson, and we went from the house and among the men was the deceased, Gus Lawless.

Q. He went with you?

A. Yes, sir; and we stayed at Kendall's some time until supper was announced at the roadhouse, the cook came up and told us that hash was ready.

Q. From what roadhouse?

A. From the Holbrook roadhouse at the post office, and then we went down to supper.

Q. Who went with you?

A. Why there was Holbrook, and Joe Lawless, Gus Lawless, and myself, and I don't remember if there was any others along
261 with the crowd or not—there was several others there at supper.

Mr. CLEGG. Go ahead now and state what you did.

A. Well, I went in and had supper along with the others at the roadhouse—the table was full, some eight or ten in number. The first man that finished supper was the bartender, Penrose. The roadhouse man Holbrook never came in as the table was full but he remained in the front room, the post office. We went out then, I think Lake was one of the first men, but Penrose himself was the first to leave, and I think the second man to leave was Lake, then the deceased Lawless and myself we finished supper about the same time and retired from the table to the post office there. Lake seated himself on a chair, or on a box or something——

Q. Show to the jury on plaintiff's Exhibit "A" where they were seated in the post office?

A. I believe Lake was sitting here with his back to the door (indicating on plat).

Q. About half way between the stove and the door to the right?

A. Yes, sir?

Q. As shown on there, chair?

A. Yes, sir; and I sets on a box near the point of the lounge near the table also, and Lawless seated himself here, and about that time or immediately afterwards Fred Owenning came out and took a seat

on the couch, and John Anderson and Joe Lawless came in later and were standing in here about the stove.

Q. You mean Joe Lawless, brother of the deceased?

A. Yes, sir; Joe Lawless and John Anderson; and at about that time why Bill Taylor, I believe, came into the house and handed me a bottle to alleviate Gus Lawless, he had hurt his hand or
262 something, and Holbrook said that was no good for a bruise, or he didn't think it was.

Q. When was this, before or after supper?

A. After supper; Holbrook hadn't got in to supper—and so Taylor turned around and went away at once.

Q. Go on and tell the jury whether anything was said by Owenning or any one.

A. Yes; they was just talking in a common conversation and not about anything in particular—just pretty much everything in general.

Q. And then where did you go?

A. Why, when Bill Taylor went away Bartender Penrose left; well, I follows after Penrose and when I got out and went down I noticed Bill Taylor and Bartender Penrose standing in front of the Struck & Van Hook's saloon.

Q. Show the jury about where that was you saw them, Mr. Norval?

A. Just about here [indicating on plat], about the window—about the corner of the window between the door, the entrance of the door and the window. I went up and we spoke a few words about rain—there is usually hay-making and such as the likes of that around there—and just as we began to talk Penrose turned around and opened the door and went into the bar; I started to walk away when he went in, and Matheson called me—at least I recognized his voice——

Q. Where from?

A. Inside of the bar.

Q. Where were you standing?

A. I had turned to walk away past the window towards the roadhouse.

Q. What did he say?

A. He says, "Ben, oh, Ben," and I walked on until he
263 shouted again and I turned around and walked inside the saloon. I walked in and as I passed Bill Taylor stepped in behind me and at that time George was seated in a chair at the back of the bar, right near the little safe, and he asked me something about the row or fight they had and who was the cause of it, or what was the cause of it. I said: "I guess whiskey—I guess it didn't amount to nothing." And he seemed very angry about it and he raised up and exhibited a revolver and asked me what I thought about it; and I says, "Hell, that's no account; put that up." He says, "I believe it's all right," and I says, "O, hell, yes; it looks all right to me," and it did look very menacing to me. On that he fired it into the floor and walked rapidly around the bar, out from behind

it, and started for the front door, and as he got to the front door Bill Taylor backed up against it and he said, "You won't get out here," and George says, "Get out of my way," and Bill Taylor says, "I say you can't get out of here," and I walked up and attempted to put my hand on him, and he says, "Stand back; don't touch me," and he turned and walked rapidly to the rear door and I followed after him and he went out and passed the warehouse corner and come up on the sidewalk—he is a fast walker, anyhow; good musher—and I shouted to Ed. Mack, "Stop him; he's got a gun," and about that time the two men come up face to face like travellers meeting each other, and Mack did let on as though he was going to stop him, and it seemed to me the defendant raised his hand and Mack stepped to one side and the defendant moved on in the direction of the house, and I heard someone else holler back of me. Penrose was standing—I was about along here, at the corner of the warehouse, and Penrose was about here [indicating on plat], and he shouted to
264 to this Scott Holbrook, who was taking some clothes off the line in the rear of the house, and he shouted to Holbrook and Penrose made a run for the back door, the kitchen door, and I turned around then and faced back towards Matheson and I saw Bill Taylor then about the end of the sidewalk, and I turned around then and ran back, first toward the back door and then turned and came back to the sidewalk, and as I came back I heard these three shots.

Q. You heard three shots?

A. Yes, sir.

Q. From what direction?

A. In the post office—the roadhouse, rather.

Q. You saw what building Matheson entered?

A. Yes, sir; he entered the post-office end of the roadhouse.

Q. Then, what did you do?

A. I stood—it didn't appear like I did anything—it didn't appear like anybody did anything to me. And I then walked after that on towards the sidewalk, and just then Matheson came out of the house and the crowd followed out.

Q. What was his appearance or demeanor when he came out?

A. He just walked back toward the barroom—towards the Struck & Van Hook saloon, and a crowd of us gathered there; the first man I spoke to was Lake. I asked him——

Q. We dont care what you said to Mr. Lake; did you meet Matheson, the defendant?

A. No; I never got in his way any more; I saw him, but I didn't get in his way.

Q. Was his manner deliberate or hurried and excitable?

A. No; he surely wasn't excited when he walked back.

Q. How did he look when he walked out of the saloon with the revolver?

A. He walked at a rapid gait.

Q. And what was his demeanor there—seem to know what he was doing?

A. O, yes.

265 Q. He did?

A. Yes.

Q. About what time was it when the trouble took place between the deceased and Matheson in the saloon?

A. It was near five o'clock in the afternoon.

Q. And about what time was it when you heard the shots in the roadhouse?

A. It was between six and seven o'clock.

Q. About what time would you say, Mr. Norval, elapsed from the time the trouble happened in Struck's saloon, between George Matheson and Gus Lawless, and the time you heard the third shot fired in the roadhouse?

A. An hour and a half—a little longer, perhaps.

Q. Over in the saloon when there was some trouble there and they were separated, was there anybody said anything about this fight as to Matheson or Lawless?

(Objected to as indefinite.)

Q. (Former question withdrawn.) Were there any exclamations made by any of the bystanders who said anything at that time—at the time of the fight in the saloon?

(Objected to as immaterial.)

The COURT. What is the purpose, Mr. Crossley?

Mr. CROSSLEY. I want to show what appeared to be the trouble from remarks of the bystanders.

(Objection overruled. Exception.)

A. Why, all that was said there about the fight was as to why Lawless wanted to hit Matheson when he was down. Lawless made some remark, I believe he said, "I would have been beating him yet if he hadn't squealed and said enough," and I believe Mack it was that said he couldn't squeal, or something like that, that he was too badly hurt; and I believed myself for one that he wasn't as bad as he appeared to be, by a long shot.

266 (Defendant objects, and moves the answer be stricken as not responsive to the question.)

The COURT: The latter portion may be stricken. It is competent but not responsive.

Mr. CROSSLEY: Was there anyone else said anything about the fight, as to whether or not Matheson had been egging on the fight or anything?

(Objected to as calling for a conclusion, and immaterial.)

The COURT: It is leading I think.

Mr. CROSSLEY: You say there was nothing else said you can think of?

A. Nothing; any more than that he didn't get enough, or he didn't get his needings, or something like that.

Q. Who didn't get enough?

A. Matheson.

The COURT: Gentlemen, you may have an intermission until 11:30. The jury will be in their seats at that time.

Mr. DILLON: Now if the court please, I would like to have this witness remain on the stand so he will have no opportunity to talk with any one until the cross-examination is begun.

The COURT: Very well, if there is no objection.

11:33 A. M.

Cross-Examination by Mr. DILLON:

Were you one of those who didn't think he got enough?

A. Yes, sir.

Q. You thought he ought to have been beaten more?

A. Yes, sir.

That's all.

Mr. CLEGG. That's all.

267 C. V. LAKE, witness, called on behalf of the United States, being first duly sworn testified as follows on—

Direct Examination by Mr. CROSSLEY:

What is your name?

A. C. V. Lake.

Q. Where do you live Mr. Lake?

A. Chicken Creek, Fortymile Precinct, Alaska.

Q. In your testimony please talk to those gentlemen in the jury so they can hear what you say; how long have you lived there?

A. I made my home there since the fall of 1901.

Q. What is your occupation?

A. Miner.

Q. Were you acquainted with Gus Lawless in his lifetime?

A. Yes, sir; had a speaking acquaintance with him.

Q. How long had you known him?

A. I had known him about four years, just to have a speaking acquaintance.

Q. Do you know the defendant, George Matheson?

A. Yes, sir.

Q. How long have you known him?

A. I first saw him in 1904; I didn't get acquainted with him until a couple of years later.

Q. Where were you living on the 24th day of May 1908?

A. At Chicken Creek.

Q. Are you acquainted with the situation of the Struck & Van Hook saloon and the Struck roadhouse run by Scott Holbrook as it was in 1908, on the 24th of May?

A. Yes, sir.

Q. Look at the plat marked "Plaintiff's Exhibit A" and tell the jury whether or not that is an approximately correct representation of the Struck saloon marked "No. 1" and the roadhouse marked "No. 2?"

268 A. Yes, that's a fair representation.

Q. About how far apart are those two buildings, Mr. Lake?

A. Which two buildings?

A. The Sruck saloon and the roadhouse?

A. Well, it is probably 75 or 80 feet—between 75 and 80 feet—it is probably more than 75 feet and less than a hundred, I think.

Q. Just sit down now; I think that's all as to that. Where were you on the afternoon of May 24th, 1908?

A. I was there at Chicken Creek at the post office, and also at the saloon and in and out of the saloon; I took dinner in the roadhouse, of which the post office is a part.

Q. When were you in the saloon?

A. About four o'clock in the afternoon.

Q. Were there any other parties there at the time?

A. Yes, sir; a number of us.

Q. State who they were.

A. Well, Ben Norval, and myself, and Mr. Jack or John McRay, Penrose, Joe Lawless, Gus Lawless, and Mr. Mack; Mr. Johnson part of the time, and Mr. Holbrook part of the time, and George Matheson was going in and out when I first went in there.

Q. State to the jury if anything happened there, and about what time.

A. Well, along about—I had been there, I guess, a half hour, and I was talking with Mr. McRay; I merely put that in to show you the position I was in; I was standing near the end of the stove and McRay set to the left and I was talking with him, and Mr. Norvel stood back of me yet, and while we were talking I noticed them shaking dice back at the bar and George Matheson was going in and out it seemed like, and Holbrook was talking and others talking getting up a wrestling match, and I said to McRay, "If they
269 get to wrestling they will get to fighting," and we were talking and in a few minutes George Matheson came in the door, he had been out somewhere, and he stepped up to the bar where Gus Lawless was standing against the bar——

Q. Gus Lawless?

A. Yes, sir; he was leaning against the bar, and my position was about seven feet from Gus Lawless, and George stepped in beyond him, and beyond George was Mack standing alone, and Penrose was behind the bar, and the others, three or four of them over near the counter formerly used for commercial purposes when they had a store, and Mr. George Matheson suddenly spoke to Mr. Lawless and said, "I will bet you five dollars——"

Q. Where was Joe Lawless standing?

A. He was standing a little back of me and a little over to one side, but at this time he was standing so I could lay my hand on him; and so Mr. George Matheson said, "I will bet you five dollars"—I don't know what about; so then George says, "I'll bet you ten," and he says, "I'll bet you twenty." And before he could speak his brother Joe stepped up and wanted to bet. Gus pushed him back

and George says, "I'll bet you fifty," and Gus said he would take it and George said "I'll take it," and then George says, "I'll bet you two hundred," but before that Joe had stepped up and said he wanted to bet, and after they said that George says to Joe, "What do you know about it?" he grabbed him by the neck and he says, "What do you know about it," and he threw Joe down and George Matheson got on top of him and they were flopping around there; their feet were about two feet from me and Gus then got them apart and pushed Matheson against the bar and he says, "You fellows
270 can't fight in here." Just then Mr. Penrose, standing behind the bar, says for them not to fight in there, to go outside; and Joe says, "Fight fair anyhow," and with that Joe pulled his coat off and put it on the bar and I don't know where—anyhow his coat fell off the bar; then George began to pull off his coat and he stood—there was the thickness of the stove between us—thickness of this drum that was made for the stove, made of a tank—and he started to pull his coat off; Joe was working to get his coat off like an intoxicated man will, if you have seen them, and George Matheson was standing near the bar and he rushed right in between him and the bar and caught Gus's brother about the same as he had him before and they went down with the heads to the rear like. Then Mr. Gus Lawless went down right on top of them like, and at the time I was looking towards the stove—you see the stove drum is about fourteen inches above the stove part, with a piece of pipe in it, and the drum itself was 18 or 20 inches thick and while I was looking at them I didn't see any of the striking, and there was no blow that I could see; and then I saw George Matheson partly raise up; he was behind the stove like, you see, and I saw his feet turn up and he fell over as though he had been struck or pushed, and he fell on his back and I kind of looked back, and Gus Lawless came down on him striking at his face, and he put his hands up warding off the blows and Gus striking at him, although I couldn't tell whether he struck him or not.

Mr. Taylor and Joe Lawless was there also; Mr. Taylor, however, wasn't there at first, he came in later; and Mr. Holbrook later on, I noticed, had hold of Gus Lawless' hands and as he pulled him off Gus Lawless says, "Let me go, let him holler enough," and he jerked away and struck him two or three times again. And at that
271 time George Matheson lay with his head on the floor and Gus hit him three or four times and they grabbed him again and pulled him off, and in the struggle they pushed him back and he stepped over George Matheson—I want you to understand George Matheson fell cross-ways of the room behind the stove, and then Penrose came back and shut his fist and he says, "You shan't pound him any longer, you have handled him enough." Then Gus Lawless turned and went towards the front door and as he got pretty near the front door I turned my back and he remarked to the boys, "I wouldn't do that, and damned if I will stand it—I would at least tell a man I was coming." Then they all gathered over on the side of the building next the counter and commenced to talk and I moved

over towards them, and Mr. Holbrook was there, and Mr. Mack, John Anderson was there, and I think two or three others, but I can't recall their names, and myself. And there was one or two of them, I couldn't tell positively who it was, but I think at least one or two of them said, "Well, he got what he has been looking for," and another says, "Yes, he has needed that for a couple of years."

Q. Who was he referring to?

A. George Matheson; and some one said, "Yes, it served him just right," and while they were talking I glanced towards George and he was sitting in a chair with his hands in his lap in a dazed sort of way, and I turned towards them and I glanced at him again——

Q. Just speak up a little louder.

A. —I glanced at him again and he still didn't move. I then walked out and walked to Kendall's saloon and stopped in there.

Q. Where was that from the Struck saloon?

A. About 45 or 50 feet from there.

272 Q. In the same direction as the roadhouse or opposite?

A. Right north up the creek; the buildings all face to the east, and this building is to the north up the creek.

Q. How long were you there?

A. Well, I should judge about an hour or an hour and a half.

Q. Who was there with you?

A. Well, Kendall, and one other man, I think—but after a while the others came in.

Q. Did you see Gus Lawless after the trouble?

A. Yes, sir; Gus and Joe both.

Q. In what saloon?

A. Kendall's saloon; I think they all came up there.

Q. You were there an hour or hour and a half?

A. Yes, sir; I should judge about that.

Q. Then what did you do?

A. Well, while they were there the boys were talking, they didn't talk about much, and then Holbrook opened the door and said supper was ready and we all started and went down there to supper; and we went into supper and they had a long table, and I noticed Mr. Gus Lawless at the table when I first went in, and Joe Lawless came in afterwards.

Q. Who all were there?

A. It is pretty hard to name them; George Stabler was there with his wife at the time and another woman, Mrs. Holbrook, and I couldn't tell you who all the names were; and we ate supper quietly, there was some little talk, just general conversation, I couldn't tell you what it was. And after supper we went out in the post office—that is the part of the building used as a post-office.

Q. How long were you eating supper?

A. O, it might have been half an hour; some fifteen minutes, and some half or three-quarters of an hour.

273 Q. How long had you waited at the roadhouse before you had supper?

A. I walked right in and washed and ate supper.

Q. What did you do after supper?

A. I went into the post-office building, they all had to come in that way; there was a door lead into the post-office through a partition, into a kind of little alley-way where you go upstairs; you came right out of the roadhouse part into the post-office and came into that room and we stood around there, and some others were talking——

Q. Just show on Exhibit "A" there [witness indicates] this No. 2, this is the roadhouse?

A. Yes, sir; in the front part of the roadhouse——

Q. That is the post-office?

A. Yes, this is in the post-office part; this is the dining room part, and here is the hall and here is the stove; and I was standing around here and Gus Lawless was here; he had had one of his knuckles knocked out of joint and Holbrook brought some arnica in and he said it was good for him; and with this exception, he is the chair, and here is the box where Lawless sat; it was a box against the window like, and this table should be right down snug in the corner, and this table right here, and this chair was about in the center of the hall.

Q. In the center of the room?

A. Yes, in width; in the width of the room which is about fourteen feet wide as near as I can estimate.

Q. Now go ahead and tell the jury—you have already told where you sat; where was Gus Lawless and Joe Lawless and Anderson?

A. I was sitting here; if the front door is about in the center; a little over to this side was a window here on this side; this is
274 the east end of the building—this part here is the east end of the building you will see, and this is the west end, and I was sitting right next this table in about the same relation to where Gus Lawless sat, here, and John Anderson was sitting in a chair, and Joe Lawless was standing here over where the post-office is railed off when I seen that last; I was sitting here as I say, with my legs crossed and with my eyes on the floor; and while I was sitting there I heard some one——

Q. Now, what time was this?

A. That was in the neighborhood of half past six.

Q. And how long after supper?

A. Well, it might have been a little later; might have beem half past six or twenty minutes to seven, somewhere in that neighborhood, and just after supper. It took maybe a little longer than it takes me to tell it—10 or 15 minutes after supper, I should say.

Q. Now, go on and tell the jury if anything happened there in that room with those gentlemen.

A. Well, there was something happened. Now, I was sitting in a chair of this kind, in the center of the room facing the door, which was about seven feet from me, and the table right here; here is the stove, a round stove marked on there [referring to plat] about here;

and Mr. Lawless was sitting by the window on the box. And while sitting there I heard some one running [tapping] about that fast, and I thought it was somebody late for supper or coming to his meal; and as that happened Mr. Owenning said: "There comes George; look out." And just then he came in the door, and I seen his left hand closing the door—he was looking at Gus at the time—and as he did so the pistol was pointed in my face, and I looked along the barrel, and he was looking at me in the eye; and at that instant
275 Lawless rushed by me and grabbed Matheson by the hand and the pistol hand was pushed back around his body like and the pistol was over here like [indicating], and it went off over my shoulder, left shoulder, I couldn't say just how far it was from me, but it was so close that I could see the little particles of dust that came out of the pistol—it was smokeless powder—I can't tell you just how far away it was, but it was close enough for that; and in an instant Matheson throwed the pistol around here [illustrating]—now I can see back to there you see, but anything back of that I can't see, being blind in one eye—and he throwed it around here and throwed the pistol out of line you see with me, and it was pointed, I turned a little and saw it was pointed at Gus Lawless' head; I suppose George had throwed it alongside of his head, and as I saw it it went off and Lawless went forward and struck on his head and arms a little, with his left foot drawn back and up a little and his right foot drawn a little—his feet were about as far from me as the corner of that box there (witness box); and as he fell George came right around with the pistol—it was all done at once, you know—came right around and put the pistol down within eight or ten inches of the back of Gus Lawless' head and fired; as the pistol exploded I saw the blood, and this man Lawless flattened right down on the floor. I turned to George then, and he, as I did so, held the pistol up over me like this, and Taylor came up and took it out of his hand, and as he did so there was another hand on his wrist; I didn't see whose it was. Then Mr. Matheson turned around and walked out of the door. I couldn't see whose hand it was, because I have no use of my right eye.

276 Cross-examination by Mr. DILLON:

So Matheson didn't fire any shot in that saloon until after Lawless grappled with him?

A. It wasn't in the saloon, beg pardon——

Q. In the roadhouse?

A. Yes; or post-office. You say he didn't fire——

Q. Until after he was grappled with by Lawless?

A. No, sir.

That's all.

Redirect examination by Mr. CROSSLEY:

You said you couldn't see whether Lawless grabbed him or not?

A. He grabbed his arm, though I couldn't see his hand.

Q. You didn't say that Lawless grabbed Mr. Matheson?

A. No, sir; there was no hand hold of him until the shot was fired—I saw each shot fired plainly and distinctly.

Q. That's all. I think the Government rests. If we can have an adjournment at this time we will know by two o'clock.

Whereupon the jury was again admonished, and a recess was taken until 2 p. m.

277 2 P. M., SEPTEMBER 9, 1909.

Plaintiff rests.

By Mr. DILLON. Before calling my witnesses I desire to make a motion. The defendant now moves the court to instruct the jury to bring in a verdict of not guilty for the reason that the evidence adduced on behalf of the State is not sufficient to sustain the charge of the indictment or to justify any verdict whatever against the defendant.

By the COURT. Motion overruled.

(Defendant excepts.)

And be it remembered that beginning at 2 p. m., September 9, 1909, the defendant to maintain the issues on his part introduced the following evidence and the following proceedings were had, to wit:

ROBERT MATTHESON, being first duly sworn on behalf of the defendant, testified as follows on—

Direct examination:

Q. (By Mr. DILLON.) You may state your name, Mr. Mattheson.

A. Robert Mattheson.

Q. You are the father of the defendant?

A. Yes, sir.

Q. How old are you?

A. Sixty.

Q. Where do you live?

A. Chicken Creek.

Q. Were you present at Chicken Creek at the time of the occurrence of what has been the occasion of this trial took place?

A. I was on Chicken Creek at the time it happened.

Q. Were you at the place, the scene of the trouble?

A. No, sir.

Q. Where were you?

A. On Stone House, a tributary of Chicken Creek.

278 Q. How soon after the occurance did you learn of it, on coming to Chicken Creek?

A. Well, Mr. Anderson came up right after it happened and told me of it.

Q. And you came down there, how soon after?

A. Three days. They would not let me go down there for three days. But I went down part of the way, but they would not let me see him for three days.

Q. How long have you been married?
(Witness hesitates.)
Q. How long have you been married?
A. How long have I been married?
Q. Yes.
A. Well, I believe I have got that marked down here, if it is no harm to look at it. If I get my glasses. Let's see, I think thirty-seven—I think I may be mistaken there.
Q. What was the date of your marriage, if you have it there?
A. I believe it was the 5th of February—no, January 5, 1897.
Q. Ninety-seven?
A. No. In 1875.
Q. Where were you married?
A. Nova Scotia.
Q. What was your wife's maiden name?
A. Barbara Mattheson.
Q. The same as your own?
A. Yes, sir.
Q. Are you related by blood?
A. Yes, sir.
Q. What are your relations?
A. Cousins.
Q. First cousins?
(Objected to as incompetent, irrelevant, immaterial, and have no tendency to prove or disprove any of the issues. And counsel for the Government moves that the question and answer be stricken.)
By Mr. DILLON. This is merely preliminary as to what was the cause of insanity. As the court has no doubt gathered
279 from the proceedings, the defense, or one of them, is that of the insanity of the defendant. It is proposed to prove by this witness and others that insanity exists or is inherited in the family; that a number of the ancestors of this defendant have been insane; that a part of his relatives, his brothers and sisters, or rather his sisters—he has no brothers—are now insane. That he himself at times has been insane, both before and since this occurrence and at the time. I think that is well within the authorities to show that if insanity exists in one's family it is competent to show that fact. It can be shown by the evidence of those who know of the insanity, and I think it is an admitted fact in medical knowledge and science, and recognized by the courts everywhere, that evidence of this kind is admissable. Evidence of the ancestry of the defendant and the relatives of the defendant and others for the purpose of showing the tendency toward insanity is competent testimony. * * *
(After argument.)
By the COURT. The evidence will be excluded at this time. I will give counsel plenty of time, if there is any question in my mind about it. I will give you an opportunity to submit authorities that you may have.
Q. (By Mr. DILLON.) How many children have you.

A. Five.
Q. What are they, boys or girls?
A. Four girls and one boy.
Q. The defendant is your only son?
A. He is, sir.
Q. What relation to the ages of the children is he, first?
A. He is the baby.
Q. What is his age?
A. Well, he is twenty-four now.
Q. Amongst those children are there any of those who at the present time are of unsound mind?
A. Yes, sir.
280 (Objected to as incompetent, irrelevant, and immaterial. Objection overruled.)
Q. How many?
A. Two.
Q. Besides the defendant?
(Objected to as leading and suggestive and no testimony to show that the defendant is insane.)
By the COURT. There is no evidence of the defendant's insanity yet.
(Defendant excepts.)
Q. What is the age of those two?
A. I think that one of them is—I have got their ages marked down here.
(Witness produces memorandum.)
By Mr. CROSSLEY. We object to that——
By the WITNESS. Object to this?
By Mr. DILLON. I think a man should be permitted to refresh his memory.
(Counsel for the Government objects to the question as incompetent, irrelevant, and immaterial and not tending to prove or disprove any issue in the case and it is not the best evidence. If any of the children have been adjudged insane his idea as to whether they are insane or not is not the best evidence. If they have been so adjudged the record is the best evidence.)
By the COURT. Well, if he knows of the facts that they have been adjudged insane I will permit it.
By Mr. DILLON. I will state to the Court that they have not been adjudged insane.
By the COURT. (After argument.) The difficulty of that is
281 if there has not been any adjudication of insanity and the witness gives his opinion upon some absent person whom the court nor the jury have a chance to see; the reason why a man not an expert is not allowed to give testimony with reference to the insanity of the defendant is simply because of the inability of an ordinary man to draw a picture of the acts of the defendant, therefore he is allowed, after describing him, to give his inferences. The jury and the court have an opportunity then to determine whether the inferences are reasonably correct, but to permit a witness to state

that one of his relatives is insane, when there is no adjudication of insanity, it is an opinion on a matter that the jury have no facts before them to determine as to the value of the opinion. An alienist might do that, but I don't think this witness can. * * * I will give you the broadest latitude in showing the condition of the defendant at or prior to the commission of the crime, and to interrogate this witness with reference to any acts of his indicating an unbalanced mind, but to draw conclusions as to a certain member of his family being insane and give them to this jury when there is no chance for the Government or any one else to put it in issue is, in my judgment, not a proper way to conduct a judicial investigation.

By Mr. DILLON. We except to the ruling of the court.

(Exception is allowed.)

By Mr. DILLON. You may state—now, if the court please, your honor knows and realizes the position I am in. I want to make the offer and ask the question to preserve the record. I am not doing this with any disrespect to the court.

By the COURT. Well, ask the question, Mr. Dillon.

Q. (By Mr. DILLON.) This question will be leading, per-
282 haps. You may state whether or not any of the members of your family or the sister of the defendant has been feeble-minded from childhood?

By Mr. CROSSLEY. The same objection and for the further reason that it calls for a conclusion of the witness, for which he is not shown to be competent.

By the COURT. (After argument.) I will permit the question, but counsel for the Government may cross-examine him as to what appearances he observed that lead to such conclusion.

(Question repeated.)

A. Yes, sir. They have been feeble-minded from childhood.

Q. Two of them?

A. Yes; two of them.

Q. What are the peculiarities of the children, from which you draw the conclusion?

(Same objection as before. Objection overruled.)

A. Well, we have to have somebody to take care of them all the time. Cannot leave them a minute, and it is no use to be cross to them.

By Mr. CROSSLEY. We move that the answer be stricken as not responsive to the question.

By the COURT. Yes, Mr. Mattheson, endeavor to respond to the question and describe the actions of the children, from which you draw such an inference.

A. Well, whenever they got anything or anything crosses them they hit you with anything they can lay hold of. They have hit me lots of times just as hard as they could hit me, and the only way we could do anything with they was to be good to them and keep somebody watching them all the time.

Q. Was there anything else——

(Same objection. Overruled.)

283 Q. (Continued.)—in particular?

A. We could not learn them no schooling.

Q. They had no ability to learn at school?

A. No; none whatever.

Q. What of their knowledge of right and wrong?

(Objected to on the same ground as aforestated and for the further reason that it calls for a conclusion and opinion of the witness. Objection overruled.)

A. They don't know anything about right from wrong. No question about that.

Q. Is either of them suffering from any disease at the present time?

A. There is one of them that is——

(Objected to as irrelevant and immaterial. Objection sustained.)

By Mr. DILLON. I offer to prove at this time that one of these children is suffering and has for many years been suffering from epileptic fits, which is a cause or evidence of insanity.

(Same objection. Objection sustained.)

(Defendant excepts.)

Q. Have you observed any other peculiarities of those children, which distinguishes them or sets them apart from others?

A. Well, I don't know as I could say.

(Same objection. Objection overruled.)

Q. With regard to the defendant himself, have you ever observed anything of that kind?

(Same objection and for the further reason that the question is indefinite.)

284 Q. Have you observed in the defendant any weakness or peculiarity that would indicate to you that he was of a weak mind?

(Objected to as leading. Objection overruled.)

A. Yes, sir.

Q. State what those peculiarities of the defendant were?

A. Of George?

Q. Yes.

(Same objection. Objection overruled.)

A. Well, we first started to try to send him to school.

Q. Yes.

A. And we got him going to school a little, but it was no use. I tried everything in the world to get him to learn schooling. One of the teachers—and done everything I could, but he would not learn—did not seem to understand anything about it and it seemed to be a nuisance to him.

Q. What else?

A. When I found out I could not do anything with school I thought I would take him into the country and see if I could make him work, and I kept him as close as I possibly could to me, and whenever he would get mad he did not seem to understand. He

could not see anything as it was. And when we was building a dredge in the Fortymile I took him down and put him to work——

Q. When was that?

A. About three years ago, '97, if I remember, and Mr. McDonald comes to me one day and he says, "It's no use." He says——

(Objected to as hearsay. Objection sustained.)

285 A. Well, he says, "We'll have to do something with him."

(Objected to as leading, and move the answer be stricken. Motion sustained.)

By the COURT. Just respond to the question and tell what you know of your own knowledge, and if there is any other man who knows anything about it he will tell that.

A. Well, I had to send him away.

By Mr. DILLON. Why did you send him away?

A. Because we could not keep him there. We were scared to do it.

Q. State what he did there, what caused you to send him away. What he did or what he didn't do?

(Objected to as leading, incompetent, and immaterial.)

By the COURT. He may state what he knows of his own knowledge.

A. Well, he seemed to get into trouble, you know, with the men. He seemed to get into trouble with the men and did not know what he was doing, and I always wanted to keep him with me, and I always did for fear something would happen, but I found there was no use to keep him there, because he would make trouble for us, and I got him to go up home.

Q. (By Mr. DILLON.) Have you noticed any other peculiarities?

A. Well, when I had men working for me, I have had men working for me in years gone by, and he would get into trouble with them in that way.

Q. In what way?

A. Well, he did not seem to think they were doing right or something.

Q. Well, in what way?

(Objected to as immaterial. Overruled.)

A. In lots of ways.

Q. Was there any real cause for it?

286 A. No real cause, in one sense of the word. No; he did not seem to know what he was quarreling about and often after he would quarrel with them he actually didn't know that he had quarreled with them. Maybe the next day he actually would not know he had quarreled with anybody.

Q. How long since has it been that you have observed this peculiarity?

A. When I first sent him to school when I went out in 1899.

Q. When did he come back to the country again?

A. I took him in here, if I remember right, in 1903.

Q. Well can you state whether this peculiarity of his were as marked then as now or whether they have been growing?

A. I always believed they were growing. I was building up all the time that he would get better as he grew older, but as he got older he started in and would do something that wasn't right.

Q. As a matter of fact, what did you find his condition to be?

A. He got worse right along, without a doubt.

Q. In conservation with him have you observed anything unusual in his talk?

A. Oh, lots of times, and lots of times he would be all right.

Q. State what, if anything, unusual occurred in conservation with him.

A. Well, whenever I would go and talk to him about some certain thing he would always tell me "I can't see it that way. That is not right." And sometimes we would talk—and some times we would be talking about some one——

Q. I want to draw your mind particularly to the attention he paid to what you were saying?

A. He didn't seem to pay any attention to it. Of course I couldn't understand him.

Q. What would he do when you were talking at him?

A. Just listen.

Q. Always listen?

A. Some times. Pretty much. He would listen and he would always tell me "I don't see it that way."

287 Q. What has been the state of his temper as to being aroused—becoming angry?

A. Of course whenever he got mad he seemed to lose control altogether, and that is one thing I never did whip him for. I made up my mind——

Q. Well, never mind. What I want to get at is this, I want to find out whether he attributed these fits of anger as the result of some cause to induce them or whether they came on without apparent cause.

(Objected to as incompetent, irrelevant, and immaterial and calling for a conclusion of the witness. Objection overruled.)

A. Some times they seemed to come on without any appearing cause at all.

Q. Can you relate any particular instance of that kind?

A. O, several times. I have seen him in the house several times that way—seem to come on just all at once. And I used to——

Q. Go on and relate anything particular?

A. Well, I used to tell him to try and be good and mind his own business and not pay any attention to any such things as that.

Q. Had his physical condition generally—has his health been good?

A. Well, for a general thing; yes, sir.

Q. What about his industry?

A. O, he didn't seem to have any industry.

(Objected to as immaterial and move the answer be stricken. Objection sustained.)

Q. Did he take any interest in the affairs of life or his own affairs?
(Objected to as immaterial.)

288 By the COURT. Objection sustained. That is purely a conclusion in which the jury have no chance in arriving at the result as to whether or not it has any basis in fact. The witnesses' opinion regarding the mental condition of the defendant should at least be based upon some fact which he tells the jury. Then the jury are in a position to ascertain whether or not the conclusion fits the frame work. But, if there is no fact testified to, the jury has no chance to estimate the opinion.

(After argument.)

By the COURT. There is no fact on which you can base the statement that the defendant has no interest in life.

By Mr. DILLON. The defendant objects to the remarks of the court.

By the COURT. I don't think that information would be material to that branch of the inquiry.

By Mr. DILLON. We ask an exception to the remarks of the court.

Q. (By Mr. DILLON.) State whether or not, within your own knowledge, any of your ancestors were insane?

(Objected to as incompetent, irrelevant, and immaterial.)

By the COURT. Adjudged so by any competent tribunal?

By Mr. DILLON. No; whether they were insane.

(Objected to as not the best evidence, incompetent, and immaterial.)

By Mr. DILLON. I asked, if he knows of his own knowledge, whether or not they were.

289 By the COURT. It does not make any difference how you frame the question, if it merely elicits an opinion, in the nature of things it must be an opinion, not any evidence. Objection sustained.

(Exception.)

By Mr. DILLON. Now, if the court, please, we offer to prove by this witness that an aunt of his——

By Mr. CROSSLEY. We object to any such offer being made in the presence of the jury.

By Mr. DILLON (continuing)—that an aunt of his was insane.

(Objected to on the ground that it is incompetent, irrelevant, and immaterial, and if the offer is made it should be made to the court and not the jury.)

By the COURT. The objection is sustained. The court will permit you to show any fact from which this witness may infer the mental condition of any of his near relatives, but the court will not permit the statement of a bald conclusion that a certain uncle or aunt of his was insane, because the jury then would have no chance to estimate his opinion unless there has been an adjudication of some court of competent jurisdiction of their insanity, in which case, of course, the record would be the best evidence.

(Defendant excepts.)

Q. (By Mr. DILLON.) You may state whether or not any of your near relatives were possessed of or showed any peculiarities which marked them out as distinguished from other people or of unsound mind, and state what those peculiarities were.

(Same objection and for the further reason that the relatives referred to are too remote to show any conclusive tendency in the case of the defendant.)

By the COURT. What relation did you have reference to?

290 By Mr. DILLON. Either cousins or aunts or uncles—cousins of the first degree or aunts or uncles.

By the COURT. I assume it means some blood relation. The witness will be confined to that. Objection overruled.

A. Well, there was one of my father's aunts and one of my mother's sisters——

(Objected to as incompetent, irrelevant, and immaterial.)

By the COURT. It is a matter of the weight of the testimony rather than its admissibility, but he may state what he knows about it.

Q. (By Mr. DILLON). State what you know about their peculiarities.

A. Well, this aunt, Minnie Ross, she just traveled from one place to another and never done anything, and the other one, on the mother's side, had to take care of her.

Q. She did not know enough to take care of herself?

A. No, sir.

Q. And had to be cared for?

(Objected to as leading.)

By the COURT. Let him state the facts.

Q. (By Mr. DILLON.) Why was she cared for?

A. Because she was not able to take care of herself.

Q. In what way?

A. She did not seem to know how to.

Q. You have said that two of your children, the daughter or daughters, besides the defendant, have to be cared for and watched—taken care of?

A. Yes, sir.

Q. All the time?

A. Yes, sir.

Q. Why?

A. Because they are not able to take care of themselves.

Q. State in what way they are not able to take care of themselves.

A. Well, they don't know enough to take care of themselves.

291 Cross-examination by Mr. CLEGG:

Q. How long have you been in this country, Mr. Mattheson?

A. I have been here eighteen years.

Q. How long has the boy lived here, the defendant?

A. The boy came here in 1894.

Q. Where were you living then?

A. In the Fortymile.

Q. How long have you lived there?
A. Well, I lived there, it seems to me—may be I am not right, but four or five years.
Q. You took him out in 1899?
A. Of course that was my home, but I was not there very much of the time.
Q. Where was he born, the defendant?
A. In Nova Scotia.
Q. How old was he in 1894?
A. It seems to me, if I mind right, he was about nine years old.
Q. You took him out in 1899?
A. Yes, sir.
Q. How old was the oldest girl?
A. How old was the oldest girl? I think thirty-two. I have got it marked down here.
Q. What is the name of your daughters?
A. The oldest one?
Q. Yes.
A. Amelia.
Q. What is the next one's name?
A. Annie.
Q. The next one's?
A. The next one is Jennie.
Q. And the next one's?
A. Emma.
Q. How old was Amelia in 1894?
A. How old was she in 1894?
(Objected to as not proper cross-examination and immaterial. Objection overruled. Exception.)
A. In 1894 I guess she must be somewhere along about twenty or twenty-two.
Q. Where is she now?
A. In Los Angeles.
Q. Is she married?
A. Yes, sir.
Q. Got a family?
A. No, sir.
Q. Where is Annie?
A. Home at Los Angeles.
292 Q. You have got a home down there, have you?
A. Yes, sir.
Q. How long has Amelia been married?
A. Well, they went out in 1896, two of the girls went out in '96.
Q. How many?
A. Two. I sent them out to school, I mean 1906 or '96.
Q. Which ones?
A. Amelia and Jennie. And something like two years after that she was married.
Q. Where did you say Annie is now?

A. She is home.
Q. In Los Angeles?
A. Yes, sir.
Q. She is at home now?
A. Amelia and her husband is taking care of her.
Q. Living at your place in Los Angeles?
A. Yes, sir.
Q. And where is Jennie?
A. She is there—home.
Q. And where is the other daughter?
A. She is home.
Q. So they are all living together there?
A. Yes. Living together.
Q. How old is the biggest girl now?
A. Twenty-six, if I mind right.
Q. Have they been to school, all of them?
A. There was two of them we tried, but it was no use.
Q. Which two?
A. Emma and Annie.
Q. The other two went to school?
A. Yes, sir.
Q. What school did they attend?
A. Beg pardon.
Q. What school did they attend?
A. They went to school in Tacoma.
Q. After they left here in 1896?
A. Yes, sir. I sent them to school in Tacoma.
Q. Well, who was it that went out first—Amelia and Annie?
A. No. Amelia and Jennie.
Q. And Emma and Annie never went to school?
A. Of course we tried, but it was no use.
Q. When did you send them to school?
293 A. I tried it here in Fortymile.
Q. What year was that?
A. In 1894.
Q. What sort of a school did you have there at that time?
A. Well, now, I forget. I don't mind the lady's name that kept school there.
Q. A Government school there, was there?
A. No, sir.
Q. It was a private school?
A. Yes, sir. They would not go to school there.
Q. Did you send them to school in Nova Scotia?
A. No, sir. They never went to school there.
Q. What was the reason?
A. Well, they were young when they came out here.
Q. How old was the oldest girl when you left Nova Scotia?
A. Well, you have got me. That is quite a while ago. I don't mind them going to school there.

Q. Do you remember what year you left there, Mr. Mattheson?
A. I believe I must have left there about twenty-two years ago, the last time.
Q. Well, Amelia would be ten years or twelve?
A. Something like that.
Q. Did she go to school there?
A. To tell you the honest truth I don't mind.
Q. How many years are there between the ages of the girls from Amelia down?
A. I think something like two years.
Q. And Jennie would be about eight then, before you left Nova Scotia?
A. Something like that.
Q. Well, she did not go to school there either?
A. If she did I honestly don't mind.
Q. That was the first school they ever went to up at the Fortymile?
A. As far as I mind.
Q. Were you living at home all the time in Nova Scotia?
294 A. No, sir. I never was home very much in the summers to stay. I went to Colorado and spent a great number of years and then I back and came to the Sound and spent a few years and then I came to this country in 1892.
Q. Now, what was the trouble that Emma and Annie that they did not go to school?
A. The teacher said it was no use and the woman asked them to try and make them and the teacher said it would be a shame to lick them children.
Q. Who said that?
A. Their mother, to see if it would do any good, and the teacher said it would be a shame to lick them children.
Q. That was in your presence she said that?
A. No, sir.
Q. Then you don't know anything about that?
A. Well, just as the woman told me.
Q. Mrs. Mattheson?
A. Yes, sir.
Q. That was in Tacoma?
A. No, sir; that was in the Fortymile if I understand it right; if I understood her right.
Q. Well, did you send them to school outside anywhere?
A. Not as I know.
Q. When did you take the other two biggest girls out?
A. Beg pardon.
Q. When did you take the two biggest out—the two that went out it was—Amelia and Annie?
A. Yes. They weren't the two biggest. They went out. They were only in here something like two years. They went out in '96 before Dawson was found.
Q. Did they all go out?

A. Just two of them.
Q. Well, when did you take the biggest out?
A. They went out in '99.
Q. You took the boy outside at that time?
A. Yes, sir.
Q. Where did he go to? To San Francisco?
A. No, sir. To Los Angeles.
Q. He went to school there?
A. We tried to put him in school. I done everything that I was able.
295 Q. Did you have your home there?
A. Yes, sir.
Q. When did Amelia get married?
A. Well, she got married in Tacoma.
Q. When was that?
A. She must have got married somewheres between—I kind of forget. Let me see, if I can place that. We went out—she must have got married in about 1899 or '98, for I know when we went out they were married and when I got to Frisco I sent a telegram for her and her husband to meet me in Frisco. I don't mind now how long they were married, may be a year.
Q. Well, they have been married now about ten years?
A. Yes, sir. And so they came down and I telephoned down to them. I didn't sent a telegram, I paid six bits and telephoned from Tacoma and they came down and went right down to Los Angeles. We met and staid there a spell and moved to Stockton and when this thing came up I had to leave and I had to send for her and her husband to take care of the girls. As long as we are able we are going to——
Q. How old were Emma and Jennie in 1898?
A. Well, if you will just permit me to look at this [referring to memorandum] I guess we can find out.
Q. Sure. Go ahead. Did you make this memoranda yourself?
A. Yes, sir. Did you say Emma or Annie?
Q. Emma and Jennie.
A. Emma is, she was, no, Annie is now thirty-two and Emma is now thirty-six.
Q. Well, give us the dates of the rest of them now?
A. Minnie was born May 29, 1876. Did I give you Jennie?
Q. No; not yet.
A. Well, Jennie is twenty-eight.
Q. How old did you say Minnie was?
A. Minnie she was born, I got it blotted out here—born May 29, 1876. It is blotted out.
Q. That would make her thirty-three?
A. Yes, sir.
Q. How old is Amelia now, have you got that down there?
A. Amelia, that is the one I am saying.
296 Q. You call her Minnie, too, do you?

A. Yes, sir; for short, sometimes.

Q. Now, what was there peculiar about them, Mr. Mattheson, about Minnie and Jennie. Can they dress themselves?

A. Well, in a certain way.

Q. Can they feed themselves?

A. O, yes; certainly.

Q. Can they sew?

A. No.

Q. Beg pardon.

A. No, they can't do that.

Q. Do any house work at all?

A. O, yes; they help sweep the house.

Q. They help to do the house work?

A. Yes, something like that. You have got to watch them.

Q. Did they ever try to kill you?

A. Yes; I have had them hit me as hard as ever they could.

Q. Did they ever injure you?

A. No; I never let them do that.

Q. Did they ever attempt to injure anybody else?

A. Well, I could not say that.

Q. Well, as far as you know?

A. Well, I honestly could not say. Not as I know.

Q. They never manifested any dangerous tendencies whatever against anyone?

A. Sir.

Q. I say, they never manifested any dangerous tendencies whatever against anybody?

A. Well, I heard some of them around the house say so.

Q. Now you are the father of the girls I am asking you about, and you testify of your own knowledge. Now they never took a knife or anything else to anybody else as far as you know?

A. I have been told so.

Q. I am asking you to testify of your own knowledge, Mr. Mattheson?

A. Not of my own knowledge; no, sir.

Q. As far as you know they never took any weapon to anyone?

A. Only just what I have heard.

Q. Can they read?

A. No, sir.

Q. Write?

A. No, sir.

297 Q. Neither one of them?

A. Neither one of them; yes, sir. That is right.

Q. Is their health good?

A. Well, I guess one takes sick every once in a while.

Q. Which one is that?

A. That is Annie.

Q. About how often?

A. About every month, sometimes oftener.

Q. How long do they last?
A. Sometimes they last may be several hours.
Q. What is the nature of them?
A. Well she gets black and frothed at the mouth, you know, and just gets dead.
Q. Does she lie down when she does that?
A. Yes, sir; lies down.
Q. And keeps perfectly still?
A. Of course she breathes. Yes, sir.
Q. In sort of a trance?
A. Yes, sir.
Q. Any pain accompany it?
A. I think it must be something awful. They don't seem to know anything about it when they come out of it.
Q. Have you ever seen her in it?
A. Never but once.
Q. Where was that?
A. Home in the house.
Q. Outside?
A. Yes, sir. You see I have been home very little.
Q. Yes. You went out a year ago, didn't you?
A. Yes, sir.
Q. And staid out until this spring?
A. No, sir.
Q. When did you come in?
A. I came in last summer.
Q. Last summer, not this summer, the one before, and stayed in all winter?
A. Yes, sir. I stayed there about 20 days, if I mind right. She had a fit when I was home.
Q. Now what do you know about your son, Mr. Mattheson. What peculiarities have you noticed about him? He has a bad temper?
A. Well, there is no question about that—but what he has.
Q. He is self-willed?
A. Sometimes; yes, sir.
Q. Strong headed?
A. Very.
Q. Vindictive?
A. Sir.
Q. He is vindictive, is he not?
298 A. It seems that when he will take them spells I would not be able to do anything with him, some way or other.
Q. He would not pay any attention to what you would tell him?
A. No, sir. Honestly, he would not.
Q. You have no control over him at all?
A. It just seemed not. He could not see it the way I did.
Q. You have seen lots of boys that way, have you not?
A. Well, I suppose may be there has been.

Q. That would not pay any attention to their father. Now, he has been up there with you since 1903, has he?

A. Yes, sir.

Q. Living with you?

A. Pretty much all the time. I have to try and keep him with me.

Q. His mother has been there all the time?

A. No, sir; she has been outside.

Q. Well, most of the time?

A. Yes, sir; but I was——

Q. You had charge of him? You knew about his habits, didn't you?

A. Well, I ought to, some way or other.

Q. You never whipped him in your life, you say?

A. Well, now, excuse me and let me tell you the reason I never whipped him.

Q. I am asking you the question.

A. No, sir. I was going to tell you about it.

Q. You are familiar with his habits?

A. Yes, sir.

Q. He used to go around and play cards a great deal around the saloons?

A. I don't think so.

Q. And drink?

A. I must tell you the truth; I don't no him to drink much. I honestly don't. If he did drink much, I don't know it.

Q. You know he was a great friend of Penrose up there?

A. Yes, sir. I think he and Penrose was good friends.

Q. He was not living with you at all, was he, the last year or two?

A. Yes, sir.

Q. Wasn't he living with Penrose the last two or three months?

299 A. Well, the winter before he worked with me. We took a dump out on Stone House, a tributary of Chicken Creek. After we got the dump out and sluicing time came it was only a small dump and I though' I would shovel the dump in myself.

Q. That would save him work?

A. He went down town, you know, and I helped shovel in another dump.

Q. Whose was that?

A. Well, let me see. If I am right, I believe it was Hollbrook's dump, if I mind right.

Q. Your son did not stay to help you wash up yours?

A. No; it was only a small dump and I thought if he went down there he would make a little money down there, but he was only down there a few days when this thing happened.

Q. He was living with Penrose at the time?

A. When he was down there?

Q. Yes.

A. I am not able to say whether he was or not, but I kind of think may be he was.

Q. When did you see him last prior to the 24th day of May?

A. Before that?

Q. Yes.

A. Well, not more than four or five days before.

Q. Where was he?

A. On Stone House, if I mind right. He was not down there more than four or five days and he promised faithfully he would come back to see me Sunday, the twenty-fourth.

Q. He was friendly with Ed Mack, too?

A. That is what I understood.

Q. He lived with him a considerable time?

A. I understood so.

Q. What time was that?

A. Well, you have got me.

Q. He went around tending to his own business most of the time, whenever he liked and wherever he liked, and did just what he liked and went wherever he liked?

A. Well, if he did I didn't know it.

Q. You did not see him very often, did you, the winter previous to May?

A. He worked with me all winter.

300 Q. He went away quite often, didn't he?

A. Well, he would go down town.

Q. How far were you from Chicken Creek town?

A. About three miles.

Q. And he used to go down whenever he wanted to?

A. Well, when he wanted to go down town.

Q. That is what I say. You didn't know what he was doing half the time, did you?

A. Well, I could not hear anything.

Q. Was there anything wrong with him when you saw him a few days before the 24th of May?

A. There surely must have been.

Q. Well, was there?

A. I don't think he was in his right mind.

Q. You knew that before he left you?

A. I thought that a great many years, and I told him so.

Q. You must have apprehended, then, there was some danger in having him at large, didn't you?

A. No, sir. To tell the honest truth, that never did strike my mind, that anything like this would happen.

Q. Did you ever take any one in your confidence and tell them about your suspicion about the boy?

A. No, sir.

Q. You never spoke to anybody about it at all?

A. No, sir.

Q. So they would be on their guard in case anything did come up?

A. I never did.

Q. Now, do you pretend to state of your own knowledge, Mr. Mattheson, about this sister of your mother's, what her condition was?

A. That is a long time ago; but I must tell you she was as much like these girls as anything I know.

Q. Do you pretend to state of your own knowledge what her condition was? Did you ever see her?

A. I have seen her, yes; several times.

Q. Visited her?

A. I have seen her; yes, sir.

Q. Did you ever see her in one of these fits?

A. I never said she had one of these fits.

Q. Then she had no fits. You said they were just as much alike as they could be.

A. Well, there is one that has no fits.

301 Q. What is the matter with the other one that don't have any epileptic fits?

A. Well, they have to take care of her.

Q. Did she ever display any violence toward anybody?

A. Well, you know that is a long time ago. I don't remember. As near as I can tell you they had to take care of her.

Q. I mean this other daughter of yours. This other girl of yours, did she ever display any violence toward anybody?

A. Well, she hit me just as hard as she could.

Q. With her hand?

A. Yes, sir.

Q. Just playing?

A. No, sir; no play about it.

Q. What did she do that for?

A. Well, something about the house.

Q. Well, you would recall just how she happened to hit you?

A. Well, I wanted her to go and put some things away—she had them all on the table.

Q. You spoke cross to her?

A. I sure didn't. The last time I ever did she got a spell and that was enough. There was no use to be cross with them; it only made it worse.

Q. And this aunt, you say it seemed peculiar she used to travel most of the time?

A. Yes, sir.

Q. And you thought it was very unusual?

A. It looked to me at the time to be.

Q. You don't think so now, do you?

A. No; I don't think so now.

Q. Your father was always of sound mind, was he not, and your mother, as far as you know?

A. Well, as far as I know, I must say they were as far as I know.
Q. You have a little temper yourself don't you, Mr. Mattheson?
A. I suppose so—some times.
Q. You get pretty strong in your feelings once in a while if any body ruffles you?
A. I suppose we have all got a temper. I am very careful.
Q. You exercise self-control.
302 A. I am very careful as far as that goes. In fact everybody knows I got a temper, but I control it.
Q. You exercise good self control all the time?
A. I try to.
Q. Now, you heard about the difficulty your boy had been in before this one of May, 1908, don't you—other troubles?
A. May, 1908?
Q. Yes, before this killing took place?
A. What trouble was that?
Q. Various mixups that he had been in?
A. Can you place them?
Q. You know old man Fritzgerald, don't you?
A. Yes, sir.
Q. You heard about that incident with him?
A. Yes, but I did not hear about that for I don't know how long afterwards.
Q. The boy kept it away from you, didn't he?
A. No, sir. The boy kept away from him, that is the way I understood. I guess it must have been five or six months before I heard of it.
Q. You heard of this other difficulty up there?
A. I suppose I did.
Q. He was kind of a bad boy in the camp up there, always getting into trouble?
A. I don't, honestly I don't think the boy knew enough to keep out of trouble.
Q. He was getting into trouble frequently?
A. I guess so. My opinion is he didn't know.
Q. And he had trouble with your men up there in the Fortymile?
A. Yes, sir.
Q. And every place he went he always got into trouble?
A. Well, he didn't seem to know anythin, about it when it was over sometimes.
Q. He prided himself upon being a fighter, didn't he?
A. I don't know.
Q. Don't you know that he did? He was a good deal heavier in May, 1908, than he is now, wasn't he?
A. He never was very heavy.
Q. He was heavier then than he is now?
A. Yes, sir; I suppose so.
Q. He has failed considerably since he has been in jail, has he not?
A. He looks to me that way.

303 Q. He is pretty handy with his fists, isn't he?
A. Why, about that I don't know.
Q. He was a sort of a smart boy, knew everything that was going on and kept well posted?
A. Well, I don't think, so far as I am concerned, that he knew much of anything.
Q. He was a pretty good miner?
A. I don't think he was any miner.
Q. He was a good shoveler and a good worker when he was helping you?
A. Well, he ought to.
Q. He was strong enough to do it?
A. I guess he was.
Q. And he was a good first-class musher, too?
A. I would not doubt but what he was a good musher all right enough.
That is all.

Mrs. BARBARA MATTHESON, being first duly sworn on behalf of the defendant, testified as follows on—

Direct examination by Mr. DILLON:

Q. Your name is Mrs. Mattheson, is it not?
A. Yes, sir.
Q. Are you the wife of Robert Mattheson, who just testified on the witness stand?
A. Yes sir.
Q. How long have you been married?
A. About thirty-five years.
Q. How many children have you, Mrs. Mattheson?
A. Five.
Q. You may state what they are, boys or girls?
A. Four girls and one boy.
Q. George Mattheson, he is the boy, is he?
A. Yes, sir.
Q. He is the youngest child?
A. Yes, sir.
Q. How old is he now?
A. He is twenty-three or twenty-four; he is twenty-four now.
Q. How old is your oldest daughter?
A. Thirty-three.
Q. Where have you been living for the last four or five or six years?
304 A. Los Angeles, California.
Q. When did you go to Los Angeles to live?
A. In 1899.
Q. And have you lived there ever since?
A. Yes, sir; until this happened; I came home here last winter.
Q. What time did you come in here last fall?

A. In August.
Q. You spent the winter where?
A. Up in the Fortymile.
Q. Then you came down here what time?
A. Came down here the 4th of July.
Q. And have lived here ever since?
A. Yes, sir.
Q. During the time that you have been living in Los Angeles since 1899 has George been at home with you any part of that time?
A. Since 1899; yes, sir.
Q. How long?
A. Well, he was home from 1899 to 1903.
Q. Until 1903?
A. Yes, sir.
Q. And has he been home since 1903?
A. Well then he came in here and stayed two years; came in 1903.
Q. And stayed two years, and then returned to California?
A. Yes, sir.
Q. How long did he stay there at that time?
A. One year.
Q. And then he came back here?
A. Yes, sir. In 1906 he came back in here.
Q. And from 1906 until you came in here last fall you had not seen him?
A. No, sir.
Q. Now, you lived in Fortymile country before 1899, did you not?
A. Yes, sir. I came in there in 1894, the first time I came.
Q. And brought your whole family with you; they were with you then?
A. Yes, sir.
Q. Did any of the children attend school at that time in the Fortymile?
A. Yes, sir.
305 Q. They went to the Fortymile mission school?
A. Yes, sir.
Q. How many of them?
A. Well, three went, then—Jennie and Annie and Emma.
Q. How long did they attend school there?
A. Well, they attended; just went occasionally. Of course Jennie went awhile, and afterwards the other two went. After they went awhile the teacher came and told me there was no use of me sending them, because they were injuring the other children, and said it would be better to keep them at home. And I asked them if there was any way to punish them and make them learn, and she said it would be a shame to punish them.
Q. Then you sent part of the children outside afterwards to go to school?
A. Yes, sir.
Q. How many?

A. Jennie and Minnie.
Q. Where did you send them?
A. To Tacoma.
Q. You sent two of them out?
A. Yes, sir.
Q. How old were they at that time?
A. Well, Jennie was twelve and Minnie was sixteen.
Q. The other two remained at home?
A. Yes, sir; at Fortymile.
Q. How old were they?
A. Well, I think Emma was thirteen and Annie about fifteen.
Q. Why didn't you send those out?
A. Because I could not send them; I had to take care of them myself.
Q. Why did you have to take care of them?
A. Because they were not able to take care of themselves.
By Mr. CROSSLEY. This testimony is objected to on the same ground urged to that of Mr. Mattheson.
By Mr. DILLON. I consent that the record may show the objection after each question along that line.
By the COURT. Very well.
306 Q. (By Mr. DILLON.) In what way were they not able to take care of themselves?
A. They could not take care of themselves at all.
Q. What was the reason?
A. Because they were feeble-minded or silly or whatever you call it.
Q. Now, was George there at that time?
A. Yes, sir.
Q. What can you say of his ability to take care of himself or did you send him to school?
A. Well, we tried, but he did not like to go to school.
Q. How old was he?
A. Well, he was nine when we came in, and in 1896, of course, he was ten years old.
Q. Did he go to school any length of time in the Fortymile?
A. Well, just a little.
Q. How long all together?
A. O, six months, maybe, about that.
Q. Now, where are those two girls, Mrs. Mattheson, that remained with you in the Fortymile and the others you sent to school?
A. In Los Angeles.
Q. What are their names?
A. Annie and Emma.
Q. Annie is the oldest?
A. Yes, sir.
Q. Where are they now?
A. In Los Angeles, California.
Q. Are they at your home there?

A. Yes, sir.
Q. Are they living alone or with some one?
A. No; they are with my other two daughters.
Q. Why are the other two daughters with them?
A. Well, to take care of them; they can't take care of themselves.
Q. For what reason?
A. Well, as I told you before, they are simple-minded.
Q. You heard the testimony of Mr. Mattheson with respect to one of them having fits?
A. Yes, sir.
Q. You may tell whether those girls have been living with you right along the last few years or have they always?
A. Always; yes, sir.

Q. Tell the jury about the girl having fits; how she has
307 them and when they first commenced.

Mr. CROSSLEY. We object to that question. We think that was ruled out before. It is not proper cross-examination.

By the COURT. I think it is proper examination if the foundation were laid, but I don't know that it has any bearing on the question of mental incompetency. Objection sustained.

(Defendant excepts.)

By the COURT. Anything, Mr. Dillon, that directly affects the mental capacity of the children I will permit.

Q. (By Mr. DILLON.) Have you ever noticed any peculiarities in George that marked him as different from other children?
A. Yes, sir. When he came home in 1905 he acted very queer. I could not do anything with him.
Q. State what some of those peculiarities were.
A. Well, I used to talk to him and want him to stay with me, and he would just sit and listen at me, and when I was through I would ask him why he didn't answer, and he would say "he didn't hear what I said."
Q. How long were you away from him?
A. About a year.
Q. You have not had a chance during the last few years to observe his conduct?
A. No, sir.

By Mr. DILLON. Did I understand the court to rule out the evidence of intermarriage and blood relation between the father and mother of the defendant until I was able to produce authorities later on?

By the COURT. I don't think that was any evidence necessarily of the transmission of insanity simply because cousins intermarried.

By Mr. DILLON. Well, I can produce my authorities later on.

Q. You may state, Mrs. Mattheson, whether within your
308 own knowledge any of your near relatives—that is, either cousins or near blood relations—were simple minded and unable to care for themselves because of their mental condition.
A. Well, I had a half sister that was feeble minded.

Q. A half sister?
A. Yes, sir.
Q. Was she the daughter of your father or your mother?
A. Well she was the daughter of my father. He was married twice.
Q. To what extent was she feeble minded? So as not to care for herself?
A. Yes, sir; she had to be taken care of all the time.
Q. Was any other of your near relatives, either cousins or aunts? Just state.
A. My father had an aunt who was that way.
Q. Did you know her personally?
A. Yes, sir.
Q. How long?
A. Well, I was about twelve years old when she used to come to father's.
Q. Did you see her often?
A. Yes, sir.
Q. How old were you the last time you saw her; the last time?
A. Well, I have not seen her—well, you see, I left there when I was about seventeen and I have not been back.
Q. Did you see her up to that time frequently?
A. Yes, sir.
Q. For how long?
A. O, well, nearly every week.
Q. Well, was it necessary for some one to take care of her?
A. Yes, sir; at times.
Q. She was not so bad all the time?
A. No, sir.

Cross-examination by Mr. CROSSLEY:

Q. How old was this sister of your father's, Mrs. Mattheson, when you last saw her?
A. Well, I guess she would be about forty.
309 Q. Was she in feeble health?
A. Yes, sir; at times she would be.
Q. And was not that the real reason they had to take care of her?
A. No, sir; she didn't know enough to take care of herself.
Q. She had never been adjudged insane by any court?
A. No, sir.
Q. Now, who was this other party you spoke of?
A. My half sister.
Q. How old was she?
A. Well, she was about thirty, I guess.
Q. When you last saw her?
A. Yes, sir.
Q. She had never been adjudged insane?
A. No, sir.

Q. These two daughters you speak of, Emma and Annie, were peaceful and quiet, were they not, around the house?

A. Well, at times.

Q. They did what you told them to?

A. Sometimes.

Q. Yes. And you say George went to school six months up in the Fortymile?

A. Yes, sir; off and on.

Q. They didn't have school up there very much?

A. No, sir.

Q. And he went to school in Tacoma a while?

A. No, sir; then he went to Los Angeles.

Q. And went to school there a while?

A. Yes, sir; went to Los Angeles in 1899.

Q. Did you live in Tacoma a while, Mrs. Mattheson?

A. Well, I was there one year before we came in her.

Q. And did George go to school there a while?

A. No; he was too young then.

Q. And the girls, Emma and Annie, they did go to school a little while up in the Fortymile?

A. Yes, sir.

Q. And then did they go to school in Los Angeles?

A. No, sir.

Q. Did they go to school in Tacoma?

A. No, sir.

Q. Now, these two daughters, Emma and Annie, whenever you talked to them or told them to do anything they understood you, didn't they?

A. Yes, sir; they understood what I said, but they would not do it without they wanted to themselves.

310 Q. Did you have any physician attend them?

A. Yes, sir.

Q. Examine them?

A. Yes, sir.

Q. When was that?

A. Well, that was when Annie first took those fits, I had Dr. John Haines, the best physician in Los Angeles.

Q. And did the doctor come and see the other daughter?

A. No, sir.

Q. Was it Annie that had the fits?

A. Yes, sir.

Q. This doctor, did he recommend that she should be sent to an asylum or a place for the feeble-minded?

A. Well, he told me it would be better for me, because it took all of my care to look after her.

Q. And you had no doctor for Emma then?

A. No, sir.

Q. Did she ever exhibit or indicate that she was apt to be violent toward anyone or injure anyone?

A. Yes, sir; if you crossed her. Of course, if you were good to her she would not show any symptoms.

Q. Did she ever hurt anyone or injure anyone?

A. No, sir.

Q. And did Annie?

A. No, sir.

Q. And did they ever injure themselves in any way?

A. No, sir.

Q. They didn't.

A. No, sir.

Q. Now, you said in response to Mr. Dillon that your son George would sit a while when you were talking to him, and then he would tell you he didn't hear you?

A. Yes, sir.

Q. You would not say he didn't understand you, would you, Mrs. Mattheson?

A. Well, he would understand me. You would think he would answer me.

Q. Was he good about minding you, Mrs. Matteson?

A. Well, if he wanted to, he would mind; but if he didn't, he wouldn't.

Q. You have seen a good many boys like that, I suppose?

A. Yes.

Q. A good many, and did you ever punish him for not minding?

A. No, sir; I never whipped him but once, and he fainted that time, and I never whipped him again.

311 Q. How old was he at that time?

A. About six years old.

Q. Did he faint or did he just lie down on the floor?

A. Well, he fell down on the floor, and I picked him up and got water and, of course, tried to bring him to.

Q. He was about six years old, was he?

A. Yes, sir.

Q. Now, did you ever have a doctor or consult a doctor about him, or have a doctor visit him?

A. Well, when he was in the Fortymile, when he had the fever.

Q. Well, that was for the fever?

A. Yes, sir.

Q. You didn't have any physician to examine him as to whether he was sane or not?

A. No, sir.

Q. Never had anyone?

A. No, sir.

Q. What fever was it he had up there?

A. He had typhoid fever.

Q. What year was that in?

A. In 1898.

Q. How many years did you say you lived up in the Fortymile?

A. Well, I went in in 1894 and stayed until 1899.

Q. Then did you come back again?

A. No, sir; not until this happened.

Q. You could not say anything about George's condition or his actions while he was up there in the Fortymile and you were in Los Angeles. You didn't know anything about what he was doing personally?

A. No, sir; I never knew anything.

Q. You didn't know whether he was getting into trouble up there before this time or not?

A. No, sir; I never heard of it.

Redirect examination by Mr. DILLON:

Q. Mr. Crossley just asked you whether or not those two girls ever injured anybody. I believe you answered they did not; can you say why?

A. Well, because we always kept watch of them.

312 Recross-examination by Mr. CROSSLEY:

Q. Did they ever make any attempt to hurt or injure any one that you know of?

A. Well, you know, if they were cross; yes, sir.

Q. Did they, I asked?

A. If they were cross they would.

Q. I asked you if they did? You say they would and I asked you did they?

A. Well, Emma hit her father once.

Q. Just with her hand?

A. Yes, sir.

Q. You never knew them to injure anybody or themselves?

A. No, sir.

That is all.

313 CHARLES B. MCDOWELL, witness called on behalf of the defendant, and being first duly sworn, testified as follows on—

Direct examination by Mr. DILLON:

State your name to the stenographer.

A. Charles B. McDowell.

Q. Where do you reside, Mr. McDowell?

A. On Chicken Creek; Lost Chicken Creek.

Q. In the neighborhood of where the defendant Matheson lives in the Fortymile?

A. Yes, sir.

Q. How long have you lived there?

A. Since 1901.

Q. Are you acquainted with the Matheson family?

A. I am.

Q. How long have you been acquainted with them?

A. I have been acquainted with Mr. Matheson since 1901, and his son, I think it was 1903 the first time I met him.

Q. Did you know the girls?

A. No, sir.

Q. How long did you know the son—the defendant?

A. I have known him since 1903, in the summer he came in, I think; I wouldn't be positive, but that's my best recollection.

Q. You have known him all the time since then?

A. Yes, sir.

Q. Have you seen him frequently since then?

A. I have.

Q. Have you had opportunity to and did you observe his conduct and actions during all of that time?

A. I have.

Q. You may state to the jury whether or not you saw anything unusual or peculiar in his conduct or actions or general make-up.

(Objected to as leading.)

The COURT. Yes; but it is difficult to get at the matter without leading. Objection overruled.

314 A. At times I have been thoroughly convinced that there was something out of the ordinary with the boy, and——

(Objected to as irrelevant and immaterial and not responsive to the question and the statement of a conclusion and not a fact.)

The COURT. I think, Mr. McDowell, the proper thing to do is to state the acts of the defendant and the conclusion may follow. The jury ought to have the benefit, in the first place, of the grounds on which that inference is founded.

A. Well, his general actions at certain times lead me to believe that there was something out of the ordinary with him.

(Counsel for the Government moves to strike the answer as not responsive. Motion sustained. Exception.)

Mr. DILLON. Well, state what his actions were.

A. Well, his looks and talk and general appearance.

Q. Now state what his looks and general appearance were.

A. Well, it was such as to indicate to me——

Q. Don't state what they indicated, state what they were.

Q. Well, it was a look that would make you feel——

Q. Describe his looks.

A. I don't know whether I can explain it as I feel it or not, but I had a fear of the young man from his appearance to me.

Q. Now, can you describe his appearance at those times?

A. Well, there was a look—I have seen him at times when there was a look that indicated——

(Government counsel object to the witness stating what his looks indicated unless he describes them.)

The COURT. Can't you describe to the jury what the appearance of the defendant was, Mr. McDowell?

315 A. Well, it appeared to me there was something out of the ordinary that seemed to place a fear that you never knew what he would do next, and you was afraid to trust him to any extent.

Q. Can you tell what that was in his appearance that made you fear to trust him?

A. I don't know whether I can explain it or not. It is hard to explain unless you can see it.

Q. In his actions or his eyes?

A. His eyes was the first thing to give me that impression.

Q. Well, now explain the appearance of his eyes—how they looked?

A. Well, I don't know—it was a look that would indicate to me that he was——

(Same objection as last above.)

The COURT. The difficulty is that is just your inference. The jury wants the facts before they can estimate the value of your inference as to his facial appearance—whether it was peaceful, calm, wild, excitable, or under what circumstances there was any extraordinary demonstration. Then the jury can determine whether your inference is justified. The jury are the ones who have to make the inferences. The witness should state the facts.

A. Well, it was a look that appeared to me that he was looking into space; in other words, he was looking and not seeing. I don't know whether I can explain it as it appeared to me or not, but it was a look that made me feel that he was—that he didn't realise what he was thinking of or something to that effect.

(Governments counsel moves to strike the answer as a conclusion.)

The COURT. Well, he said he was looking into space. I will
316 let the answer stand for what it is worth. Of course as to what he felt is the merest inference, but I take it if there are any facts stated, the inference may be given, and the jury will determine whether it does or does not follow.

Mr. DILLON. State what his nervous condition was.

(Objected to as calling for the conclusion of the witness.)

The COURT. I think this witness, if he knows the defendant, can describe his appearance, conduct, and actions that lead to any conclusion. I am disposed to give all the latitude possible in this examination, but as I have stated several times before, I want the witness to give some facts, so the jury may know whether his conclusions are reasonable or necessary. Endeavor to describe, Mr. McDowell, just the appearance of the defendant and what you know of him, before you give any conclusion as to your judgment of his mental condition.

Q. (Of Mr. Dillon repeated.) State what his nervous condition appeared to be—what it appeared to be.

(Objected to as calling for a conclusion and not a fact.)

The COURT. You ask him what his condition appeared to be without describing that appearance, and then you ask him to give his conclusion as to an appearance which he has not described. What value is that?

Mr. DILLON. Well, describe what his nervous condition was at that time?

(Objected to as leading and suggestive, and the witness not shown to have any knowledge of what his nervous condition was.)

The COURT. Well, if he knows what his nervous condition was I will overrule the objection.

A. You want as to how he appeared to me?

317 Mr. DILLON. Well, what you saw his nervous condition to be?

A. Well, he was of a nervous temperament—a nervous wreck.

(Objected to as leading and suggestive and incompetent.)

The COURT. Now, Mr. McDowell, I suggest that you state anything that you saw that conveys the facts to the jury—anything that you saw about the defendant that was peculiar. But when you say he was a nervous wreck without stating facts that would point to such a condition, how is the jury to judge that matter? Just describe his actions, conduct, facial expression, what he did or said—those are facts from which the jury themselves may draw some conclusion.

(Defendant excepts.)

A. Well, when I first noticed anything out of the ordinary it was—we were out camping, out hunting, and the first time I ever noticed him—in fact, the first time I really was ever with him any length of time we were out about sixty days, and there was one time in particular during that time that would call my attention and was sufficient to attract my attention, and, as I said, he had the appearance of staring or glaring as though he was looking and not seeing anything.

Mr. DILLON. Did you talk with him at that time?

A. I don't remember whether I did or not at that particular time; I talked with him a great deal on that trip.

Q. Did you ever, in any of the conversation you had with him, notice anything in his conversations or manner of conversing that allowed you—that caused you to arrive at the conclusion that he was different from others?

(Objected to as incompetent, irrelevant, and immaterial and leading. Objection overruled.)

The COURT. Do you understand the question, Mr. McDowell?

318 A. I don't know that I do.

Q. (Repeated.)

A. I have.

Mr. DILLON. Well, state what that was.

A. His talk was such that showed he had no respect for his father.

(Government's counsel moves to strike the answer as immaterial.)

The COURT. Are you through with the answer, Mr. McDowel—I will let the witness complete his answer, and then I can ascertain.

Mr. DILLON. I ask this in all fairness, that the witness be allowed to proceed without so much interference with him by the district attorney; these objections are interposed before the question is finished and an answer is attempted, and even after the objection a motion is made to strike the answer before a sentence is completed. Such conduct is not fair to the witness or fair to the defendant.

The COURT. The district attorney is trying to get facts before the jury instead of conclusions, and so is the court. (After argument.) Were you through with your answer, Mr. McDowell?

A. Yes; I think so.

Q. When you say that his talk was such as to indicate that he had no respect for his father, don't you see that is entirely a conclusions of your own? Why not say what he said and did, and let the jury judge? That's what we're trying to get at—the basis of your inferences. Now, I have called this to your attention a number of times, and you should endeavor to comply with the ruling of the court.

A. Well, I have heard the young man say—I don't know
319 just how the conversation came up; but, anyway, I have heard him remark, among other things, that he didn't have any money himself, but he would go and make the old son-of-a b— dig up—that he didn't care whether he had any money or not—something to that effect. That he would go up and make the old man dig up—and called him those names. I have heard him speak those words himself.

Mr. DILLON. Did you ever converse with him on general topics?

A. I have.

Q. What was his manner in general conversation at that time?

A. Quite reasonable; only I couldn't persuade him that it was wrong the way he was treating his father. His father offered him two thousand dollars if he would go outside and go to school, and I tried to persuade him where he would need the schooling and the benefit he would derive from going to school and getting an education, and I tried to prevail on him to go—that his father had the money and had offered him the money, and I talked with him a great many times on that trip and tried to do all I could to get him to go out.

Q. I want to know what he said and did.

A. And he says "I won't go to school. When they made me go to school I would do something till I got expelled," and he says "I won't go to school." And he seemed to treat it with indifference altogether.

Q. Did he take any interest in the affairs of life?

(Objected to as remote and indefinite.)

The COURT. The time should be fixed—it will avoid objection.

Mr. DILLON. The witness has testified it was during this hunting trip.

The COURT. I didn't understand the witness to testify as to
320 when the hunting trip was, even.

Mr. DILLON. When did it occur?

A. I wouldn't be positive whether it was 1905 or 1906.

Q. How long did it continue?

A. Well, we were out 60 days.

Q. Were you ever with him at any other time continuously for any length of time?

A. Not much more than two or three weeks.
Q. When was that?
A. That was at the dredge.
Q. What was his conduct there?
A. Well, it was pretty wild.
Q. Well, in what way; you say he was wild—that's a conclusions—state what he did and said.
A. Well, it was general interference with the men and creating discontent.
Q. How did he interfere with the men?
A. Talking and threatening.
Q. Relate some specific instances of that.
A. Well, he would get into conversation and get to arguing with a man, and he would call him a damned fool and stuff like that.
Q. Was there any reason for his doing that; would the men give him any occasion for that?
A. I think not; there might have been some times when there would be, but I don't know of my personal knowledge that there were any such occasions.
Q. And then his general conduct and from things that you have related, what is your opinion as to his being sane or insane?
(Objected to as incompetent, irrelevant, and immaterial, it not being shown by facts and circumstances related by the witness that he is competent to give such opinion, and there is no proxim-
321 ity of the acts testified to, if any, to the commission of the offence charged in the indictment.)
Mr. DILLON. I meant my question to this witness to cover the whole time of his acquaintance with the defendant.
The COURT. The witness ought to describe some acts on which he is to base his inference, some time in the immediate vicinity of the act charged.
Mr. DILLON. Had you seen the defendant or associated with him on or about the period surrounding the 24th day of May, 1908?
A. No, sir.
Q. How long before that had you seen him?
A. The summer before.
Q. Well, I wish to renew my question as to your opinion.
(Objected to on the same ground as last assigned, particularly since the witness has stated he had nothing to do and did not see the defendant after the summer before the homicide.)
The COURT. I think it is pretty far fetched, Mr. Dillon, but (after argument by counsel) I will overrule the objection and he may state what his opinion was. It is more a question perhaps of the weight of the evidence.
A. My opinion is there was something wrong with the man.
Mr. DILLON. In what way did you think that—as to mental disease, or what?
(Objected to as leading. Objection overruled.)

A. It was mental disease. The man at times would appear to me that there was something wrong with him.

Q. What do you mean when you say there was something wrong with him?

A. I mean I think he wasn't conscious at times of what he would do; that's exactly what I mean.

That's all.

322 Cross-examination by Mr. CLEGG:

Were you present in the court room this afternoon, Mr. McDowell?

A. I was some of the time.

Q. You heard Mrs. Matheson testify that Matheson was outside from 1905 to 1906, for a year?

A. Who?

Q. That George Matheson was out in California?

A. Who testified that?

Q. Mrs. Matheson.

A. I didn't hear her testify that.

Q. And you say this hunting trip was in 1905?

A. No, sir; I said about that time, or 1906.

Q. Well, can you now state when it was?

A. I can't be positive about it.

Q. Well, it was in 1905—do you think?

A. Well, it was either 1905 or 1906, to the best of my recollection.

Q. Where were you hunting?

A. Up at the head of Gold Creek.

Q. Who was with you?

A. Mr. Matheson and his son; we were stopped at the head of Gold Creek, Mr. Matheson and his son and I, and then Mr. Matheson and I went over to the head of Ketchumstock.

Q. You were very friendly with him?

A. Yes, sir.

Q. And have been up to this time?

A. Yes, sir.

Q. You're living at Chicken Creek?

A. Yes, sir.

Q. Whereabouts?

A. Lost Chicken and——

Q. Did you live down on Chicken Creek where these saloons are?

A. No, sir.

Q. Since when didn't you?

A. I never did.

Q. Are you a married man?

A. Yes, sir.

Q. Where is your family?

A. At Hamilton, Washington.

323 Q. How long since you have been out here?

A. 1898.

Q. 1898?
A. Yes, sir.
Q. After this hunting trip of 1905, or about then, as you say, when did you see George Matheson after that?
A. After?
Q. Yes.
A. I seen him a number of times, back and forth.
Q. Did you talk to his father during this hunting trip about what you noticed about the boy?
A. No, sir.
Q. Why?
A. Because I didn't care to mention it to him.
Q. You knew he would be directly interested in knowing?
A. Well, I didn't know whether he was or not.
Q. How many times did you see him staring into space?
A. I never seen him until that time—the first time that ever attracted my attention was on that hunting trip.
Q. How many times on that trip did you see him do that?
A. I don't think only the one time.
Q. What time of the day or night was that?
A. I don't remember.
Q. Was it in camp or while you were out hunting?
A. It was in camp.
Q. Was his father there?
A. No, sir.
Q. Nobody but you and he?
A. Yes, sir.
Q. Did you say anything to him at the time?
A. No, sir.
Q. You weren't very much scared of him then, were you?
A. No, sir.
Q. I thought you said he looked—when he stared into space it scared you?
A. I said it would put fear into a man.
Q. Were you afraid at that time of him, from the appearance he had at that particular moment?
A. I can't say I was afraid; but it put me—a fear in me—it put you on guard so you would never give him any occasion;
324 never give or take any occasion to take liberties in any way—would make you always guard against giving him occasion to take liberties or have much to do with him.
Q. You knew at the time he was a young man of violent temper?
A. Violent temper?
Q. You knew he had a violent temper?
A. Well, it indicated such to me, that he had.
Q. Well, you knew that at that time?
A. I can't say that I did.
Q. Well, why do you say that then? You weren't a bit scared of him when you noticed how he looked into space?

A. I don't remember just how long it was, but I wasn't scared.
Q. Yet it seemed to make quite an impression on your mind?
A. Yes, sir.
Q. You remember it now?
A. Yes, sir; I do.
Q. How long did he look into space?
A. I can't say how long.
Q. Had you talked with him before that?
A. Yes, sir.
Q. Did you talk with him afterwards?
A. Yes, sir.
Q. Did you tell him about it, or call his attention to it?
A. No, sir.
Q. Can't you state to the jury how long he was doing that?
(Objected to as repetition. Objection overruled. Exception.)
A. I don't remember the exact time; it was probably a minute or two, or three probably, I don't remember; anyway it was sufficient to attract my attention.
Q. And that was the only time you ever noticed that?
A. No; I have seen him since that time.
Q. I'm speaking about on this hunting trip?
A. Yes, sir.
Q. When did you notice it again since?
A. Well, I have noticed him at several times since then.
Q. Before May, 1908?
325 A. Before May, 1908, no sir; I have never seen him since that until here.
Q. Well, just state to the jury how many times you saw him since that hunting trip and prior to May, 1908?
A. I don't remember how many times, but I have been around him some, and there has been times when he wouldn't look right, that is, his general appearance.
Q. How long have you been around him except on this hunting trip you speak of?
A. How long?
Q. Yes, up to May, 1908?
A. I don't know.
Q. Well, how many times did you see him?
A. Probably a hundred, or two or three.
Q. Where?
A. Various places; Chicken Creek, Lost Chicken, and Fortymile River.
Q. Did you associate with him intimately like on that hunting trip?
A. No, sir.
Q. Where did you have occasion to notice how he looked and started into space except on that hunting trip?
A. Well, at Chicken Creek.
Q. Where?
A. He never had exactly the same appearance.

Q. Well, that then, was the first and only experience when you ever saw him staring into space like that?

A. Yes; but I have had other experiences that would——

Q. Well, tell the jury what other expressions he had or what experiences you have had along that line?

A. Well, simply wild expressions, that indicated to me——

Q. Never mind what they indicated, just tell how he looked on other occasions.

A. Well, he looked as if he wouldn't be conscious of what he was doing—that's the way I feel.

Q. That's the way you feel about it?

A. Yes, sir.

Q. You can't tell the jury how he looked?

326 A. That's the way it made me feel.

Q. You can't tell the jury how he looked?

A. I don't know whether I can or not.

Q. Well, can you?

A. I don't know whether I can express the way he looked to me to the jury.

Q. You understand that's what is wanted here?

A. Well, it was a wild look.

Q. In what respect was it wild?

A. Well, his eyes didn't look right.

Q. What was wrong with them?

A. I don't know.

Q. Well, how did they differ in look from yours or mine?

A. Well, quite different to yours.

Q. Can you tell the jury how?

A. Well, they had a look that would put fear in you, that's——

Q. Where were you when you saw that look the second time?

A. Where?

Q. Yes.

A. Well, I have seen that look a good many times.

Q. Where?

A. At Chicken Creek.

Q. Whereabouts?

A. In the hotels and saloons and at the dredge; I have never been around him a great length of time but what I would notice it.

Q. You noticed it about a hundred times, didn't you?

A. I wouldn't say a hundred times; no, sir.

Q. Did you notice it at any time during the year 1907?

A. Oh, no.

Q. Where was he then?

A. At the dredge.

Q. How long were you there?

A. All summer.

Q. How long was he there?

A. Two or three weeks.

Q. Was his father there too?

A. Yes, sir.
Q. Did you tell him about it?
A. I did.
Q. How many times?
A. I had one talk with his father.
327 Q. What did you say about it?
A. To get him to send him away.
Q. On account of the looks he had?
A. I was afraid to have him around the crew.
Q. You weren't afraid to send him any other place where you didn't happen to be?
A. Well, I told his father I felt as though it wouldn't be safe to keep him there amongst the men; it was something likely to happen.
Q. Because he was interfering with the men, as you testified on direct-examination?
A. I was afraid he would *so* something.
Q. You knew him pretty well?
A. I did.
Q. You expected him to break out most any moment and do something terrible?
A. I did.
Q. He was always quarreling with everybody?
A. Not always.
Q. Quite frequently?
A. Well, he picks quarrels when——
Q. Whether there is any cause for it or not?
A. Yes, sir.
Q. He prided himself on being somewhat of a slugger, didn't he?
A. I suppose you might say it that way.
Q. Ready to fight at the drop of the hat any time?
A. I think he was ready to fight without any drop of the hat.
Q. Yes, sir. Now, when was it his father offered him two thousand dollars to go to school?
A. The fall we were out hunting.
Q. That same fall?
A. Yes, sir.
Q. He said he didn't want to go to school?
A. Yes, sir.
Q. And because they had no use for him he would be expelled?
A. He said if they made him go he would do something to get expelled.
Q. Was he a good shot on this hunting trip?
(Objected to as incompetent, irrelevant, and immaterial and
328 not proper cross-examination. Objection sustained.)
Q. Did he go about his duties out there the same as his father and the rest of you when you were on that hunting trip?
A. Yes, sir.
Q. And you didn't notice anything peculiar about his talk except on the one occasion in conversation with him when he mentioned about making the "old man" dig up?

A. We never had that on that trip.
Q. Where was that he said that?
A. At Chicken Creek.
Q. When?
A. I dont remember the time.
Q. After the hunting trip and sometime in 1907 probably?
A. It was either 1906 or 1907.
Q. He had the habit of going to the old man to get money whenever he run short?
A. He did.
Q. He would always get it?
A. No.
Q. Pretty nearly?
A. I cant say about that.
Q. Well, the old man was kind to him and gave him money anf time he wanted it?
A. I cant say he did.
Q. Then you dont know anything about it?
A. I do.
Q. Well, did he or did he not?
A. I know of instances he has given him money, and at times he hasn't.
Q. Did he give him any this time when he went to him?
A. I dont know.
Q. Did you tell his father about that?
A. No, sir.
Q. Why didn't you?
A. I never spoke to his father but one time in my life about the boy.
Q. You regarded this boy a spoiled boy didn't you—yourself?
A. Well, I certainly didn't regard him as safe by any means.
Q. Did you or did you not regard him as a spoiled boy?
339 A. I certainly did.
Q. And that in fact was all that was the matter with him?
A. I think not.
Q. What else was wrong with him?
A. I think he was'nt conscious of what he was doing at the time.
Q. Lots of boys are like that—probably he dont know what's going on this minute at all?
A. I dont think any such thing.
Q. Do you think he does?
A. I think he does, probably.
Q. What makes you think that?
A. Because I have conversed with him when he was unusually bright.
Q. You haven't talked with him recently?
A. No, sir.
Q. Nor today?
A. No, sir.

Q. You think he is thoroughly conscious now, don't you?
A. I have no ground to form an opinion at the present time.
Q. You said you thought he was conscious of what is going on here, now?
A. As far as I know, yes.
Q. So you don't know whether or not he was all right on the 24th day of May, 1908, when this killing took place?
A. No, sir.
Q. He might have been, in your opinion?
A. No, sir; he wasn't, to my opinion.
Q. He wouldn't be, you think?
A. No, sir.
Q. What do you base your opinion on?
A. The times I had seen him before.
Q. And you hadn't seen him for a year prior to this time?
A. Yes, sir; I had.
Q. When, in the summer of 1907, you said?
A. I seen him about, I think it was about the 10th of May that year.
Q. Didn't you testify a short while ago that you hadn't seen him before that since the summer of 1907?
340 A. I did not.
Q. Didn't you testify, sir, that you hadn't seen him since the last summer before that?
Q. What last summer?
Q. Mining out there, the summer of 1907?
A. No, sir; I never said it.
Q. You never said it—positively?
A. I'm positive.
Q. When did you see him last prior to the 10th of May, 1908?
A. I seen him on or about the 10th of May; I left Chicken Creek, I think, about the 10th of May, 1907.
Q. Did you see him after that?
A. After 1907?
Q. Yes, sir.
A. No, sir; I never seen him after I left Chicken Creek, I think the 10th of May, 1907.
Q. Still, you're willing to tell this jury that on the 24th day of May, 1908, he wasn't conscious of what he was doing?
A. No, sir; I don't mean to say that.
Q. What do you mean to say, then?
A. In my opinion he might not have been, and he might have been.
Q. And he might have been?
A. Yes, sir; I have conversed with him and talked with him when he was all right to all appearances.
Q. You never thought he was insane?
A. I don't know as I can judge what insanity is.
Q. Well, you never thought he was insane though, at any time?

A. I wouldn't care to express myself that way.

(Objected to by counsel for defendant as unfair to the witness.)

The COURT. I think he should answer that question. He has already stated indications which he considers sufficient to say that he wasn't right in some respects.

A. I can tell you what I do think about that.

341 Mr. DILLON. I would like to refer the court to the record as to what his testimony is on that; I don't think counsel has any right to place his own inference on the testimony.

The COURT. My memory is pretty good as to just what he has said. Let the witness answer.

(Defendant excepts.)

Mr. CLEGG. You wouldn't say he was insane?

A. There is different times I have saw him when I thought there was something mentally wrong with him.

Q. And that's as far as you will go?

A. What would be termed insanity, I don't know as I am capable of judging.

Q. Well, that's as far as you will go—that sometimes when you saw him there might be something mentally wrong with him?

A. Yes, sir.

Q. That is, he was mentally weak?

A. Yes, sir; he undoubtedly was.

Q. And at other times he was a bright boy?

A. Yes, sir.

Q. And knew everything that was going on?

A. Yes, sir.

Q. And took a keen interest in everything?

A. Yes, sir.

Q. And prided himself on being a slugger?

A. Well, he is a young man inclined to be a rowdy, yes, sir.

That's all.

Redirect examination by Mr. DILLON:

Now a moment ago you stated you had seen him on the 10th day of May, 1908?

A. About that time.

Q. You testified afterwards that you left Chicken Creek about the 10th day of May, 1907. This crime is alleged to have been committed on the 24th day of May, 1908—how long before that date did you leave Chicken Creek?

A. I left Chicken Creek on or about the 10th day of May, 1907.

342 Q. Then, when you said you saw him on or about the 10th day of May, 1908, you were mistaken?

A. If I said that I was mistaken. I went to the Copper River country, started on or about the 10th day of May, 1907, and never seen the young man since until here.

That's all.

J. J. FURLONG, witness called on behalf of the defendant and first duly sworn, testified as follows on—

Direct examination by Mr. DILLON:

State your name to the jury.

A. James Furlong, J. J.

Q. Where do you reside, Mr. Furlong?

A. Fairbanks.

Q. Where were you residing on or about the 24th day of May, 1908.

A. I was up in the Cascade Mountains, I believe.

Q. Are you acquainted with the Matheson family?

A. Yes, sir.

Q. When did you first get acquainted with them?

A. In 1895.

Q. How long did your acquaintance continue?

A. Well, I knew them for a part of that fall and winter, and then towards Christmas I went out to the creeks and didn't see them until the next spring, 1906.

Q. Do you mean 1905 or 1895?

A. 1895.

Q. And then you didn't see them again until 1906?

A. No; I boarded at the house that fall, 1895.

Q. And from 1895 to 1906 where were you?

343 A. The winter of 1905 and 1906 I was on Miller Creek.

Q. Now, let's see. It is quite easy to be confused as between 1895 and 1905—most everybody calls it ninety-five.

A. Well, in 1905, after Christmas, I went out on the creeks to work.

Q. You stated in answer to my question when you first became acquainted with the Mathesons that it was 1895?

A. 1895.

Q. And you knew them how long at that time?

A. I was in town about three or four months.

Q. Then where did you go?

A. Out on the creeks.

Q. And how long did you stay?

A. Until the next spring.

Q. That would be 1896?

A. Yes, sir.

Q. Then where did you go?

A. In July I went to Circle City.

Q. And how long were you away then?

A. I never went back until '97; I went back to Dawson and didn't go back to the Fortymile country until 1904.

Q. Until 1904? Were the Mathesons there then?

A. Yes, sir; on Chicken Creek.

Q. Did you renew their acquaintance at that time?

A. Yes, sir; I took a lease on a piece of ground on the Stonehouse Forks.

Q. And you knew George Matheson there?
A. Yes, sir.
Q. How long were you there?
A. I came in the last of March or the first of April, I wouldn't say.
Q. And remained how long?
A. I worked a lease there until the next July, and then came over here.
Q. Now, during that time you were there in 1904 how often did you see George Matheson, if at all?
344 A. I saw him every day for the time I was there, almost.
Q. Did you observe his conduct and appearance and general demeanor during that time?
A. Well, I seen a good deal of him; he worked on the windlass a few hundred yards from where I worked.
Q. Were you at the home of the Matheson's during that time?
A. Yes, sir; I boarded at the house with them.
Q. How long?
A. All the time that I was—well, now hold on—the last month I think I was there I batched in a cabin.
Q. Now, you may state to the jury whether you observed the conduct and appearance of George Matheson, this defendant, during that time, and whether there was anything in that conduct that particularly attracted your attention and state what his conduct was—not your conclusions, about what the conduct was?
A. Well, I was sleeping with him in the same bunk; and the first thing I noticed about him that was anything out of the way, I was at a dance on Chicken Creek one night and I came home—I had been drinking and I tried to tiptoe my way into the house so as not to waken him, and up he jumped out of his bunk and called me all sorts of names; and he says, "Well, you come back"; and I says, "Of course I came back." And he kept on abusing me, and I was going to slap his ears, and I took hold of him a little rough, and his father told me to go out. And there was a man there by the name of Bresnahan, says to me, "Come away; don't pay any attention to him"; and so I went on to Bresnahan's cabin and went into his bunk and went to sleep. And George, it seems, was coming over to the cabin, and he got into the door; and Bresnahan hollered
345 out loud, and he says, "George, you stay out of that cabin, now"; and at that I woke up, and he was getting away from the door, and he dropped a stick or something he had in his hand, and I hollered at him, and I says, "You want to be careful, coming around here with a stick, or I will get after you." Well, then I went back to bed, and the next morning I worked as usual on the windlass.
Q. Before going any further. What were your relations with George before that?
A. Well, we had always been friendly; yes.
Q. Was there any occasion for his——
A. I couldn't see any whatever.
Q. Any reason you know for his becoming angry?

A. I couldn't see any occasion, because I was making no noise.
Q. Had you had trouble with him before that time?
A. Not that I know of.
(All of these questions are objected to as leading.)
Q. Well, you may go on and state——
A. Well, the next morning he came down to work, and I says, "George, you're a funny fellow; what did you want to abuse me like that for?" And he said, "Well, I had forgot all about it." This was about ten o'clock in the morning, and it was pretty hot, and he wanted to know if I would have a glass of beer. I says, "I don't mind"; and later on he wanted me to come up and eat supper, and I didn't want to go up. I says, "No; I don't think I will go up; I have stuff cooked at the cabin, and I think I will eat up there"; and he seemed to be pretty friendly afterwards for two or three days.

346 And then another day he came around, I had been hoisting quite a bit of dirt, and Mr. Mattheson didn't seem able to hoist quite as much dirt, and we put another man in his place. And George says, "You think you're the best man on the creek, don't you?" I says, "No." He says, "You think you can hoist more dirt than the old man?" I says, "I ought to; I'm younger than he is by a long ways"; I says, "What's the difference? The more I hoist, the better for you people; you own an interest in the ground, and you're getting your 25% on the dirt; the more I hoist, the better it is for you." Well, he seemed to want to argue the point that I wasn't as good a man as his father.

Q. Just relate what he said.
A. Well, he said his father could hoist and I says "Just let it go at that, whether he can or not."
Q. Go on—if there is anything further.
A. Well, I didn't have any more words with him and we got to be friendly again; but before I left the creek, a short time before that, I quit the lease and then came over here.
Q. Do you remember any other conversation you had with him about this trouble and he afterwards brought it up?
A. No, I never mentioned it afterwards to him and he didn't to me; but I moved into this cabin with this Alex Caldwell; we moved into the cabin and he was working with me and he told me that Matheson had quit.
Q. Permit me to direct your attention to the conversation we had last night, in talking about this subject, when——
(Objected to as leading.)
The COURT. Counsel may refresh his memory.
Mr. DILLON. When he said there were two other men there on the creek that could lick you?

347 A. Oh, yes; I believe that's right. He told me after we had talked about this hoisting more dirt than his father, he said if I ever put my hands on him any more that he would get two friends of his to whip me; that he was going to lay for me and give

me a good licking. I says, "You tell them fellows to do a good job, or I will lick them all afterwards."

Q. How long was that after the trouble?

A. I think it was the same day we talked about hoisting so much dirt.

Q. He seemed to be jealous of the fact that you hoisted more dirt than his father?

A. Yes, sir.

Q. How old was he, about?

A. That's a little over four years ago now.

Q. He was then about twenty years of age?

A. I didn't know exactly how old he was.

Q. Now, I think you stated a while ago to the jury that there was no reason you knew of for him becoming angry at you that night?

A. I couldn't see any reason; me and him——

Q. Were you acquainted with the girls of the family?

A. Yes; I was partially acquainted with them—saw them at the house.

Q. Now, before I proceed with that matter, I have another question I will ask you: From the conversation you had with George Matheson on Chicken Creek on this occasion, and his demeanor toward you, did you form an opinion as to whether or not he was sane or insane a part or all of the time?

(Objected to as incompetent, irrelevant, and immaterial, and calling for a conclusion of the witness, and it doesn't tend to prove or disprove any issue in the case because it is too remote.)

348 The COURT (after argument). The description given by this witness is such as to portray the subject matter testified to in point of fact much better than could his opinion about it, and an opinion on a matter of that kind would be absolutely valueless because he has depicted just exactly what occurred. It is clearly too remote.

(Defendant excepts.)

Mr. DILLON. Were you acquainted with the Matheson girls?

A. Well, slightly, yes.

Q. How many?

A. The only one I paid any attention to was the larger of the girls, was the only one that I noticed in particular any more than the others; Annie, I believe it was.

Q. When was that?

A. The first year I came in, 1895.

Q. In 1895?

A. Yes.

Q. Well, never mind, I don't care to ask anything about that. Now, you left there in July of the year in which you have described this incident as taking place?

A. Yes; I believe it was July I came over here.

Q. Have you seen George Matheson any since that?

A. Not until now; no, sir.

Mr. CROSSLEY. No cross-examination.

Whereupon the jury was admonished and the court adjourned until tomorrow morning at 10 o'clock.

FAIRBANKS, ALASKA, *September 10—10 a. m.*

J. J. FURLONG recalled for further direct examination.

By Mr. DILLON. When you were on the witness stand yesterday, Mr. Furlong, you related some of the instances that you con-
349 sidered abnormal, or some of the acts of the defendant you observed while you were boarding in the family of his father. You may state whether or not there were any other things that you observed at that time which you did not recall or relate them?

(Objected to as incompetent, irrelevant, and immaterial, and too remote to have any bearing on the charge in this case.)

The COURT. I will permit the witness to testify as to any acts at the time, but not what his opinions are.

Mr. DILLON. Relate whether or not there were any other instances at that time you considered abnormal?

(Objected to on the ground that no time has been fixed.)

Mr. DILLON. My impression is that was fixed at 1904.

(And counsel for the Government further object to the question as leading and incompetent when he asks whether there were any other acts he considered abnormal.)

The COURT. Fix the time, Mr. Dillon, if you can.

Mr. DILLON. When did this incident you have in mind occur?

A. Well, this was in 1904.

Q. Relate just what it was.

(Same objection. Overruled.)

A. They had a cat in the house——

The COURT. Speak a little louder, Mr. Furlong.

A. They had a tomcat in the house, and he used to masturbate this tomcat.

Q. Anything else?

A. Yes; and I also seen him once do the same acts with a dog.

Mr. CROSSLEY. I don't think the jury can hear you.

The COURT. Speak up loud so the jury can hear.

A. I said I seen him masturbate a cat and also a dog at different times.

350 Mr. DILLON. How old was he at that time?

A. Well, he was twenty years old, I believe.

(Counsel for the Government move that the answer be stricken as not responsive, and the testimony as to such acts does not tend to prove or disprove any of the issues in the case.)

The COURT. I don't think it is responsive or material in any event. It may be stricken. (After argument by Mr. Dillon.) Very well, I will let the testimony stand and the jury may consider it for what it is worth. That was in 1904 you said?

A. Yes.

Mr. CROSSLEY. That is certainly very remote.

Mr. DILLON. It is a question as to the weight of the evidence I should think.

Mr. CROSSLEY. No cross-examination.

Mr. DILLON. Now, if the court please, your honor has ruled on this proposition, but I hope at some time during the day to present authorities that will alter that ruling, as to whether or not it is competent when a witness testifies that he is well acquainted with the person whose sanity is questioned to state what his opinion is on that subject. I have found one case in Idaho where the witness related that he had the opportunity to, and did, observe the conduct and habits of the defendant, and the court holds he may then state his opinion as to the defendant's sanity or insanity, based upon that observation.

The COURT. I have permitted that wherever the witnesses have detailed facts from which they drew their inferences. I have permitted that right along excepting with this witness, who details facts occurring some four years prior to the alleged crime.

351 Mr. DILLON. I understood the court to hold that they might relate the incidents, but not express their opinion.

The COURT. They have related their opinions, both on cross-examination and direct examination; but I have insisted on them stating the facts to the jury upon which they base their inferences, so the jury might have the opportunity to see whether they agreed with them or not.

Mr. DILLON. I agree with the court on that; but my understanding of the ruling was that the court would not permit them to express their opinion as to the sanity or insanity of the defendant.

The COURT. I have insisted on the witnesses detailing first the facts and circumstances upon which they base their opinion, and then they were permitted to state their conclusion to the jury. (After argument.) There may be a difference of opinion about the rule, but the decided weight of authority is that the circumstances should first be given upon which the opinion is based, and then the jury are to draw their own conclusions.

Mr. DILLON. I will ask this question then, and the court may rule on it: Basing your opinion on your acquaintance with the defendant, from your observation of his conduct and habits while you were acquainted with him, and from his acts with which you are acquainted and which you have related to the jury, have you formed an opinion as to whether this defendant was during that time, at all times, or a portion of the time, of unsound mind?

The COURT. Answer that yes or no, without giving your opinion of the matter.

A. I don't think he was.

The COURT. That answer may be stricken; answer the question yes or no, whether you have formed such opinion?

352 Mr. DILLON. I asked whether you have such opinion, whether you have formed such an opinion?

A. Yes, I have.

Q. You may state what that opinion was.

(Objected to as incompetent, irrelevant, and immaterial, and not tending to prove or disprove any issue in the case, and it is shown by the witness' own testimony that he only knew the defendant a short time in 1895, and a short time in 1904.)

The COURT. You didn't see the defendant at all between the years 1904 and 1908?

A. No, sir.

(Objection sustained. Exception.)

Mr. DILLON. That's all.

353 Mrs. ROTHENBERG, witness called on behalf of the defendant, being first duly sworn, testified as follows on—

Direct examination by Mr. DILLON:

Q. State your name.

A. Mrs. Rothenberg.

Q. Where do you reside?

A. Miners Fork.

Q. Where is that?

A. A tributary of Chicken Creek.

Q. In the Fortymile country?

A. Yes, sir.

Q. How long have you resided there?

A. Since 1898.

Q. Are you acquainted with the defendant?

A. Yes, sir.

Q. And with his immediate family?

A. Yes, sir.

Q. His father and mother?

A. Yes, sir.

Q. How long have you known them?

A. Since 1898.

Q. Have you known them ever since that time?

A. Yes, sir; except Mr. Matheson went out at certain times.

Q. Well, you knew them while they were in the country?

A. Yes, sir.

Q. Have you had an opportunity to see them often, and have you seen them often there?

A. Yes, sir.

Q. Did you ever pay any attention to or observe the conduct, actions, and habits of the defendant?

(Objected to as leading.)

The COURT. Necessarily so, I think. Objection overruled.

A. Yes, sir.

Mr. DILLON. Did you ever notice anything abnormal about——

(Objected to as incompetent, and leading and suggestive.)

The COURT. Complete your question, Mr. Dillon.

Mr. DILLON. Did you notice or observe anything abnormal in the mental condition and in the habits of the defendant—don't answer until they make their objection.

354 (Objected to as leading.)

The COURT. It is leading and suggestive, but she may answer whether she did or not.

A. Yes, sir.

Mr. DILLON. You may relate what those acts and habits were, describe them to the jury. Don't state your opinion, but state what you saw and observed.

(Objected to, unless it is first shown that it was reasonably proximate to the time of the alleged crime.)

The COURT. I am disposed to permit the witness to describe any acts she observed at any time she knew the witness—the defendant.

Mr. DILLON. I'll ask you another question. You have known the defendant all of this time?

A. Yes, sir.

Q. Up until the time this act was committed?

A. Yes, sir.

Q. Now you may answer the question.

(Same objection. Overruled.)

A. I never thought that George did act——

(Objected to as the statement of a conclusion and not the facts.)

The COURT. The question is for you to describe the acts of the defendant which you considered unusual. Describe the acts themselves and not the impressions they formed on you.

A. He was always very nervous and never was like any other child, and never would mind his parents; he never would go to school, and he was—when you would speak to him it seemed to be he didn't understand it or didn't want to hear—I don't know which it was. But he wasn't like other children. I have known him ever since 1898.

Q. When you say that you would speak to him or in conversation with him he didn't understand, do you say that was at

355 all times, or only at certain times?

A. At certain times.

Q. Now, over what or how much of that period of time would that trait of character appear?

(Objected to as incompetent and immaterial unless it is confined to near the time of the alleged offence. Objection overruled.)

A. Well, it was shortly before—it was in 1908.

Q. Did you notice those peculiarities more or less frequently during the whole of your acquaintance with him?

A. Yes, sir.

Q. You say he was nervous?

A. Yes, sir.

(Objected to as leading and suggestive. No ruling.)

Q. Now, then, you may describe to the jury, if you can, in what way this nervousness displayed itself; in what way it affected or in what manner the defendant manifested his nervousness.

A. Well, he couldn't set still a minute, and he would seem to be worried and fi'gety—I don't know as I can describe it—he was always very nervous.

Q. From your observation of the defendant and his conduct and peculiarities—those things that you have related—and your acquaintance with him, have you formed and have you now an opinion as to whether he was of sound mind or sane during the whole or part of your acquaintance with him?

(Same objection as before to this line of questioning.)

A. Yes, sir.

The COURT. This witness seems to have had a more intimate acquaintance with the defendant than the last and to have
356 known him shortly prior to the homicide. She has described the peculiarities which she contends existed until the summer of 1908. The objection may be overruled.

Mr. DILLON. Have you such opinion?

A. Yes, sir.

Q. You may state what that opinion is, as to whether or not he was sane or insane?

(Same objection. Overruled.)

A. I think he was of unsound mind.

Q. You think he was at the time—during the time that you knew him, and at the time this act was committed of which he is accused?

A. Yes.

Cross-examination by Mr. CLAGG:

Mrs. Rothenberg, whereabout is Miner's Forks?

A. A tributary of Chicken.

Q. How far is that from the scene of this shooting?

A. Two and a half miles.

Q. You spent most of your time at Chicken Creek?

A. No, sir.

Q. You were down there the day of the shooting?

A. No, sir.

Q. You were not?

A. I was not.

Q. Then you don't know anything about his condition at that time do you?

A. No, sir.

Q. Nor the day previous?

A. I think I did see him the day before.

Q. Where?

A. I don't remember.

Q. Well; was it down at Chicken Creek?

A. No, sir; it wasn't at Chicken.

Q. At Miner's Forks?

A. I think it was—I don't remember.
Q. Where did you see him?
A. I don't remember.
357 Q. When did you see him?
A. I don't remember.
Q. You don't know whether you saw him or not the day previous?
A. I think I did.
Q. You're not positive?
A. No, sir.
Q. Did you see him the day before that?
A. I don't remember.
Q. When did you see him prior to the 24th day of May, 1908?
A. I don't remember.
Q. In January?
A. I don't remember.
Q. February?
A. I don't remember.
Q. March?
A. I don't remember.
Q. April?
A. I don't remember—I have seen him off and on, but I don't remember what dates.

(Counsel for defend'nt objects to this line of questioning. It isn't fair to the witness and there is no excuse for counsel being so aggressive.)

The COURT. I think it is perfectly proper Mr. Dillon, and it is not necessary to discuss it. This witness has testified to her conclusions as to whether or not it was insanity that caused this act. Anything that will enlighten the jury as to that conclusion is proper. The objection is overruled.

(After argument.) In cross-examination as to the ground of an asserted fact, especially an important date, is not unusual. This jury is composed of intelligent beings, and when these questions are asked if the witness doesn't remember these particular incidents just as she has described them on direct examination, the jury know how to weigh those circumstances—they have had experience of their own and can determine how far it bears on the force and effect of the testimony already given. Objection overruled.

(Defendant excepts.)

Mr. CLEGG. When did you see him prior to May 24th, 1908?
358 A. I think it was a few days before that, I don't remember the dates there; I seen him shortly before that.
Q. Well, you can tell within a month or two how long?
A. Yes, sir: I think a few days before.
Q. What did you notice peculiar about him at that time?
A. Well, he seemed nervous and fidgety and restless.
Q. You can remember that thoroughly now, can't you?
A. Yes, sir.

Q. But you can't even remember where you saw him?
A. I think it was at home.
Q. At your place?
A. Yes, sir.
Q. Who was with him?
A. I think he was alone; I don't know.
Q. You're pretty sure it was at your place, are you?
A. Yes, sir.
Q. Now, that your mind is directed to the incident, you remember that it was at your house, do you?
A. I think it was; because he often called on his way home.
Q. Do you know Mrs. Vincent, who lived at Chicken Creek?
A. Yes, sir.
Q. Weren't you down to visit her the 24th of May?
A. No, sir.
Q. Weren't you at her place that morning?
A. No, sir.
Q. Sure about that?
A. Yes, sir.
Q. Or the night before?
A. No, sir.
Q. When did you first know George Matheson?
A. In 1898.
Q. Where?
A. At the Fortymile.
Q. And in 1899 also?
A. Yes, sir.
Q. In 1900?
A. No, sir; they went out in 1899.
Q. Then you didn't see him for a year or so?
A. No, sir.
Q. How long was he gone, if you remember?
A. I think they came back in 1903.
359 Q. You of course had no opportunity to observe him while he was away?
A. No, sir.
Q. What did you notice peculiar about him in 1898?
A. Well, he wasn't like other children.
Q. He was a little different?
A. Yes, sir.
Q. He was more depraved than other children, wasn't he?
A. Yes, sir.
Q. How often did you see him during the year 1898?
A. I was nursing Mrs. Matheson and I saw him every day.
Q. Living right there at the house, were you?
A. Yes, sir.
Q. And you have, of course, been friendly with them ever since that time?
A. Yes, sir.

Q. And you have sort of a special interest in George, haven't you?
A. No; not in particular.
Q. Well, you used to visit back and forth at their place up there and see them often?
A. Yes, sir.
Q. And he often called at your place?
A. Yes, sir; we always visited back and forth.
Q. And that's all you know about him—he was nervous and fidgety generally?
A. Yes, sir.
Q. And sometimes when you would talk to him, he would appear sometimes as if he didn't understand?
A. Yes, sir.
Q. And you know that he showed no respect for his parents?
A. Yes, sir.
Q. And wouldn't pay any attention to them if they corrected him?
A. No, sir.
Q. And that's about all you know about it?
A. Yes, sir.

Q. Now, which particular circumstance was it that leads you
360 to think that he wasn't of sound mind during some of the times you observed him, Mrs. Rothenberg?

A. Well, he would always act, yes, sir; always acted different than anybody else.
Q. In the way you have described only, and the manner you have described?
A. Yes, sir.
Q. But I say which particular circumstances is it that brings you to the conclusion that he was of unsound mind—there isn't anything specially unusual about a person being nervous, is there?
(Objected to as argumentative and not proper cross-examination. Objection overruled. Exception.)
A. Well, I don't know as I can describe it; he was different and nervous and fidgety. Sometimes my husband and I would speak to him and he didn't seem to notice us at all—didn't seem to know what we were talking about and he would wait awhile and then start on something else entirely different as if he didn't understand us.
Q. You knew he was a boy of bad habits, didn't you?
A. Not that I know of; it was what I heard, not that I know.
Q. That was his general reputation up there?
(Objected to as not proper cross-examination. Objection sustained.)
Q. You knew about his habits of life and method of living, didn't you?
A. O, at times I did.
Q. You knew he drank considerably, didn't you?
(Objected to as not proper cross-examination.)

The COURT (after argument). Anything she knows of the
361 man herself that might bear on his mentality is proper. Objection overruled.

(Defendant excepts.)

Mr. CLEGG. Did you know that, Mrs. Rothenberg?

A. I never saw him taking a drink of liquor.

Q. Didn't he ever drink any in your company?

A. I never saw him.

Q. Isn't it a fact, now, that you were drinking with him the morning of the 24th of May, 1908, in Mrs. Vincent's cabin?

A. I wasn't at Mrs. Vincent's cabin; I was invited down to the store and also down to Mrs. MacK's—I never went downtown on the 24th of May, 1908.

That's all.

Capt. EDWIN HALL, witness called on behalf of the defendant, being first duly sworn, testified as follows on—

Direct examination by Mr. DILLON:

State your name to the jury.

A. Edwin Hall.

Q. Are you acquainted with the defendant, George Matheson?

A. Yes, sir.

Q. How long have you known him?

A. I have known him—I can't tell the date, but it was in jail I first saw him.

Q. What was your occupation in 1908 during the summer and for some time thereafter?

A. I was guard at the Federal jail.

Q. Here in Fairbanks? Were you guard in the Federal jail down here?

362 A. I was guard at the Federal jail at Fairbanks.

Q. Were you guard there at the time he was first brought to Fairbanks?

A. Yes, sir.

Q. How long did you continue to be guard there after that?

(Objected to as incompetent, irrelevant, and immaterial and not tending to prove or disprove any of the issues in this case, and refers to a time about three months after the alleged crime.)

The COURT. It is only preliminary yet; I will hear it until I can determine what the purpose is. You need not answer until the district attorney has an opportunity to object.

A. I was guard there until the 15th of this last January.

Mr. DILLON. Was the defendant there in jail and in your custody during that time?

A. Yes, sir.

Q. Did you have an opportunity to and did you observe his habits and conduct during that time?

(Objected to as incompetent, irrelevant, and immaterial and not tending to *rpive* or disprove any issue in the case and occurring subsequent to the alleged offence.)

The COURT. Did you know the defendant prior to May 24, 1908?

A. No, sir.

(Whereupon the jury was excused from the court room, and, after being admonished, retired in charge of their sworn bailiffs, as heretofore, during the argument.)

Mr. DILLON (after argument by Mr. Clegg). If the court please, the theory on which we are offering this testimony and the purpose for which we offer it doesn't come within the scope of the authorities cited by counsel. I think they state the proposition and the law applicable thereto properly. In those cases it was a question of an opinion being formed since the killing.

363 Now, then, the theory on which this evidence is offered and the purpose for which it is offered and the rule under which it ought to be received is this: That if evidence is offered proving or tending to show the insanity of the defendant at the time of the commission of the act or previous to that time, then, after that has been done, evidence may be adduced of insanity existing subsequent to the time for the purpose of carrying it over the particular time at which the alleged crime was committed. It is a presumption of law that when insanity has once been established it continues until it is proved to no longer have an existence.

The COURT. That is a species of insanity that you don't contend for so far, and which does not exist according to your own evidence, and therefore the rule is not applicable. (After argument.) I can see the force of your contention if this witness had been acquainted with the defendant before the commission of the act as well as subsequent to it; but he knew nothing about him. Now, counsel certainly sees the danger of this class of testimony. All the acts of the defendant since that time, whether feigned or natural, would be observed by this witness and would be given and go to the jury as bona fide, when, as a matter of fact, his whole conduct might be feigned in anticipation of a defence.

Now, if prior to the commission of the offence this witness had known him and been able to observe the conduct of the defendant, then he might be able to say whether his conduct since incarceration was different from that previous to the homicide, and the jury would have a chance to weigh its value; but this witness has no

364 knowledge of that whatever—all he knows is his conduct since the commission of the alleged crime. Now, there are a thousand circumstances entirely foreign to the facts of the case, which might cause the defendant to act entirely different since, that he acted before, the homicide. * * * (After further argument.) In response to your question just now as to the rights of the defendant, so long as the court has displayed what I consider the extreme judicial liberality he has in this case, and allowed the defendant to prove every possible act or piece of conduct that lead up to it to

indicate a diseased mind at the time of the killing, the defendant has no ground for complaint; but to say that subsequent acts that might be entirely different as far as this witness' knowledge goes—that might be feigned—that might be induced by the fact of incarceration—that might have been brought about in different ways unknown to the witness, to say that such things should be proved and the defendant given the whole realm of speculation before the jury, is something that a court of justice should not indulge.

Mr. DILLON (after argument at length). I have this witness and one other on this subject. Now, I will state while the jury is absent what I expect to prove by this witness and the other one. They were both guards at the Federal jail from the time the defendant arrived here; that they had opportunity to, and did, observe the conduct and appearance of the defendant during his incarceration, and they have stated to me there was at least a portion of the time they had reason to believe and did believe the defendant was insane;

that there were times when he was all right and bright enough,

365 but at times they believed he wasn't accountable for his acts,

for what he did, or the effect of his acts, and that is the testimony I now offer, and I offer to prove it by Captain Hall and Mr. Peterson, who were guards in the Federal jail immediately after and for some time after his incarceration.

(After further discussion, counsel was given until 1 o'clock p. m. to look up authorities and present further argument on the question; the jury being thereupon returned into court, upon the order of court, and being called, the full panel is shown present.)

By Mr. CLEGG. Before adjourning I would like to get into the record the date when this witness first saw the defendant George Matheson, so the record will show the remoteness of that date from the date of the alleged crime.

Mr. DILLON. I can't tell whether their records down there will show—do you remember the date, Captain?

A. I do not remember the date when he was brought there.

Q. Can you and will you ascertain when he was brought there?

A. Yes, sir.

The COURT. Did you see him when he was first brought?

A. Yes, sir.

Mr. DILLON. Do you know what month it was he was brought there?

A. I can't say; only I know it was last summer.

Q. How long before that time had you been guard at the jail?

A. A year and a half.

Q. And were guard at the time he was brought?

A. Yes, sir.

(Whereupon, the jury being admonished, retired in charge of their sworn bailiffs, and court was declared in recess until 2 p. m. this date.

366 FAIRBANKS, *Sept. 10, 1909—2 p. m.*

(After submission of authorities.)

Captain EDWIN HALL recalled for further direct examination.

By Mr. DILLON:

I believe you stated you were a guard at the Federal jail when the defendant was brought there?

A. Yes, sir.

Q. Can you tell now what date he came there?

A. Yes, sir.

Q. What was it?

A. June 28th, at 5 p. m.

Q. Of what year?

A. 1908.

Q. And you were there how long after that?

A. Up until the 15th of this last January.

Q. During that time did you have opportunity to, and did you, observe the defendant and his conduct and habits and his manner and peculiarities if he manifested any while he was there?

A. Yes, sir.

Q. You saw him every day?

A. Yes, sir.

Q. If he manifested any unusual traits or conduct you may relate to the jury what those were.

(Same objection as before. Objection overruled.)

The COURT. Now answer the question so the jury can hear you.

A. Well, there was times he was all right, and other times he would act nervous.

Q. Now describe this nervous condition so the jury may judge just what it was.

A. One time he cried and took on there terrible for nearly a whole day; he said he knew his mother was dead and cried just like a child.

Q. When was that?

A. That was sometime—I couldn't tell you the date.

Q. Well, about Mr. Hall?

367 A. Well, it was in somewheres about—I don't remember—if I'm not mistaken November or December, it was in the winter sometime I think.

Q. How long did he keep up or manifest that?

A. Nearly all that day that time.

Q. He repeated that same thing did he?

A. No, not the same thing; there was different times he would be laying in his bunk very quiet, everything would be quiet there, and different times when I thought he was asleep he would holler out and sing just as loud as he could.

Q. At the time he feared or expressed the belief that his mother was dead, do you know any cause for that—whether he received any news that caused such belief?

A. Not that I know of.

Q. Do you know of any communication at that time——

(Objected to as leading. Objection overruled.)

The COURT. Have you completed your question Mr. Dillon?

Mr. DILLON. Do you know whether any other person besides yourself, if there were any others, had any communication with him that could have conveyed any news which would lead him to form an opinion that his mother was dead or otherwise?

(Objected to as incompetent, irrelevant, and immaterial and assuming something that hasn't been testified to, and calling for a conclusion.)

The COURT. He may testify whether he knows the defendant could be in communication with anybody else—if he knows.

A. I don't know of anyone who could be in communication with him at all.

368 Mr. DILLON. Can you state any other particulars as to his conduct?

A. No; I could not.

Q. Now, from your observation and consideration of appearances while he was there, and all the opportunity you had to observe the conduct and demeanor and temperament of the defendant, did you form an opinion as to whether he was sane or insane a portion or all of the time?

(Objected to as incompetent, irrelevant, and immaterial.)

The COURT. He may answer whether he did or not—whether he formed such an opinion.

A. Yes; I did.

Mr. DILLON. State what that opinion was.

(The same objection, and on the further ground that it is too remote from the time the act was committed. After argument, objection overruled.)

A. Well, in my opinion it was nervousness; that's all I thought it was.

Q. Well, now, please explain what you mean by nervousness—you answered the question as to whether he was or was not insane, you formed an opinion?

A. Yes, sir.

Q. Now, whether he was sane or insane—it isn't a question of degree; that can be determined afterwards.

A. Well, I should say he wasn't in his right mind at all times, but I'm not an expert on insanity.

That's all.

Cross-examination by Mr. CROSSLEY:

You couldn't say he was insane?

A. I could not; no, sir.

Q. You merely want the jury to understand he was of a

369 highly nervous temperament?

A. Well, there was times he did things that would indicate he wasn't in his right mind.

Q. You say he sang out. Don't the other prisoners sing out, too, sometimes?

A. Not the way he does.

Q. Isn't it a fact that a great many of the prisoners who are in there for any length of time often sing?

A. O, yes.

Q. And you say he took on there one time and thought his mother was dead?

A. Yes, sir.

Q. Did he have a letter to indicate that his mother was sick?

A. Not that I know.

Q. Isn't it true that he had at that time received a letter?

A. If he did, I don't know about it.

Q. You couldn't say he hadn't?

A. No, sir; not of my knowledge.

Q. The most you can say, then, is that the defendant is affected with nervousness—that is, you wouldn't say he was insane, but that he was nervous?

A. Well, he acted like to me that he was nervous at times; sometimes it would be nearly all day he wouldn't say a word to anybody—just lay in his bunk—and other days he would come out and talk to everybody.

Q. He seemed to know the difference between right and wrong, didn't he?

A. Well, if he was told not to do anything you would have to keep asking him not to do it—tell him every little while not to do it, to cut it out.

Q. No—he wasn't inclined to take your orders, was he?

A. No; not at all times.

370 Q. Isn't it true that you noticed he had a high temper?

A. I suppose he did.

Q. Isn't it true, Captain, that he had a bad temper and would get very mad easily?

A. I never saw him only to be quarrelsome.

Q. Only to be quarrelsome?

A. No; I never saw him quarrelsome.

Q. I say, he had a high temper?

A. Well, he never showed much of it.

Q. You think you didn't notice the fact that he had a high temper very much?

A. No; he never got in no trouble with the other men while I was there. The only time we ever threatened to lock him up, one time he was arguing with this man Perevich, and I commanded them both to stop; they were both high tempered.

Q. Perevich sang out in the cell there, too?

A. Yes, sir.

Q. And other prisoners sang there?

A. Yes, sir.

Q. You didn't think it very peculiar that they should sing to keep themselves company?

A. Well, they would go at it in a different way.

Q. Doesn't each and every one of the prisoners go at it in a different way?

A. Yes.

Q. Each and every one has his own peculiarities, doesn't he?

A. Yes, sir.

Q. How is that?

A. Yes; generally.

Q. Now, you never knew the defendant, George Matheson, before you saw him there in the jail on June 28, 1908?

A. No, sir.

Q. You never knew him at the time of the alleged crime on the 24th day of May, 1908?

A. No, sir.

Q. Or before that?

A. No, sir.

371 Q. So you couldn't say what his condition was mentally at the time, could you?

A. I could not.

Q. Didn't know anything about it?

A. No, sir.

That's all.

Redirect examination by Mr. DILLON:

You have no interest in this case?

A. No, sir.

Q. Have you any acquaintance with the family at all—the Mathesons?

A. None whatever.

That's all.

372 P. S. PETERSON, witness called on behalf of the defendant, being first duly sworn, testified as follows on—

Direct examination by Mr. DILLON:

You heard the testimony of Captain Hall?

A. I did.

Q. Were you a guard at the jail at the same time he was?

A. Yes, sir.

Q. Were a guard there when the defend'nt George Matheson was brought there?

A. Yes, sir.

Q. Do you know what date that was?

A. June 28, 1908.

Q. How long did you remain there after that?

A. Until January 15th.

Q. 1909?

A. Yes, sir.

Q. During that time were you there on duty every day, or almost every day?

A. Yes, sir.

Q. What were your hours usually?

A. From 11.00 a. m. to 9.00 p. m.

Q. During that time did you have opportunity to, and did you, observe the conduct and demeanor of the defendant?

A. Why—yes.

Q. His actions and behavior?

A. Yes.

Q. If you saw anything unusual or abnormal or which specially attarcted your attention to him by reason of its being unusual or abnormal during that time, you may relate that to the jury—now not what your opinion is, but the conduct or acts of the defendant, describe them to the jury if there was anything unusual.

(Objected to as incompetent, irrelevant, and immaterial, and not proving or tending to prove whether the defend'nt was sane or
373 insane on May 24th, 1908. Objection overruled.)

A. Well, just on one occasion that Mr. Hall spoke of when he seemed to imagine his mother was dead.

Q. Well, describe his conduct and behav*oir* at that time?

A. Well, he was crying very much for about all day, I guess.

Q. As a matter of fact, didn't it extend over a couple of days?

A. Well, it might—I don't remember. Once he was quite wild, running around back of the cage crying that he knew his mother was dead, and he asked somebody if his father was dead.

Q. Did he say any one told him that, or that he had heard from them, or give any explanation?

A. Not that I know of.

Q. Do you know whether he had received any communication?

A. No, sir.

Q. Do you know of any other peculiarity that marked him out as different from other men?

A. Never.

Q. Did you form an opinion as to whether he was sane or insane from your observation of his conduct and temperament during your acquaintance with him there in the jail?

A. No, sir.

That's all.

Cross-examination by Mr. CROSSLEYS:

You don't know but he may have received some communication that his mother was sick?

A. I don't know.

Q. There have been other prisoners, that have been in jail there while you were on guard that had cried now and then?

A. I probably seen him cry once; I couldn't say besides him whether the others did.

374 Q. That was the only occasion that you saw him?

A. You mean the defend'nt?
Q. Yes?
A. That's the only one, that one time that I remember of.
Q. All the balance of the time you were there he seemed to be rational and sane?
A. Yes, sir.
Q. And he so acted?
A. Yes, sir.
That's all.
2.50 p. m. Defendant rests.

375 GOVERNMENT'S REBUTTAL.

HENRY STRUCK, witness called by the Government in rebuttal, being heretofore sworn, testified as follows on—

Direct examination by Mr. CROSSLEY:

You testified in this case the other day, Mr. Struck?
A. Yes, sir.
Q. How long have you known George Matheson, the defendant?
A. I first knew him in the winter of 1898–99.
Q. When did you next know him, Mr. Struck, or see him up in the Chicken Creek country?
A. O, I couldn't say what year, whether it was 1903 or 1904.
Q. Was that when he came back from California?
A. Yes, sir.
Q. State to the jury whether or not you knew him, then, from 1903 or 1904, whichever it was, until the 24th day of May, 1908, continuously?
A. No; he was away for about one year or a year and a half during that time.
Q. He was away one year then?
A. Yes, sir.
Q. But during the time you knew him since 1898, in 1903 and since up to the 24th day of May, 1908, except that one year that he was away, just state to the jury *to the jury* whether or not you ever noticed any particular abnormal peculiarities of his?
A. No; I never did.
Q. You never did?
A. No, sir.
Q. Just state to the jury whether, from your observations of the defendant, George Matheson, whether in your opinion he was insane or sane at any time.
A. I always considered him sane.
Q. Always considered him sane?
A. Yes, sir.
376 Q. And you knew him well, did you not?
(Objected to as leading.)
Q. Just state how well you knew him, Mr. Struck.

A. Well, he stopped at my place the last two years a good deal of the time, probably a third of the time.

That's all.

Cross-examination by Mr. DILLON:

What was your business, Mr. Struck, for the last two years he was stopping with you?

A. Running a roadhouse and saloon, and also doing mining.

Q. Did you ever have any trouble with the defendant?

A. Sir?

Q. Did you ever have any trouble with the defendant?

A. No; not personally, no, sir.

That's all.

ED. MACK, witness for the Government in rebuttal, having been theretofore sworn in the case, testified as follows on—

Direct examination by Mr. CROSSLEY:

You testified in this case before?

A. Yes, sir.

Q. How long have you been acquainted with the defendant, George Matheson?

A. Since the summer of 1905.

Q. Since the summer of 1905? State to the jury how well acquainted you were with him from that time up until the killing on the 24th day of May, 1908.

377 A. Well, I was—I met him off and on most every day from 1905 until the year he left and went out to California, I believe.

Q. What year was that, if you remember?

A. I can't recall now the year that he went outside.

Q. How long was he gone?

A. I think he was gone one winter.

Q. When he came back what was your acquaintance with him?

A. The same as before; I met him frequently at the road houses and saloons.

Q. Did you live with him or he with you or anywhere near each other?

A. Well, he had stopped at my place for several nights, but not very regular.

Q. What was your relationship with him as to being friends or not?

A. Why, I always considered him a friend of mine.

Q. Will you state to the jury whether or not you ever observed any peculiarities of the defendant during your acquaintance with him.

A. Well, the only peculiarities I observed, if you would call them peculiarities, was that he was high-tempered and seemed to be high-strung and self-willed.

Q. Will you state to the jury whether or not, from your observation and acquaintance with the defendant, that he was sane or insane at the time just previous to the offence on the 24th day of May, 1908, Mr. Mack?

(Objected to as incompetent and immaterial, no foundation laid. Objection overruled. Exception.)

Q. You did observe him?

A. Certainly.

Q. And you saw him that very day, did you not?

378 (Objected to as leading. Objection overruled. Exception.)

A. Yes, sir.

Q. And he was just about the same that day as——

(Objected to as leading.)

Q. I withdraw that question. State to the jury whether you noticed him acting any differently that day from what he had acted other days.

A. Oh, I couldn't say he did act any different.

Q. Now, just state to the jury what your opinion is as to whether he was sane or insane at any time previous to or at the time of this alleged crime.

A. Well, I couldn't state. I have no opinion on the matter of his sanity or insanity.

Q. You wouldn't say he was insane, would you, Mr. Mack?

(Objected to as leading and suggestive.)

I merely want him to state in a positive way.

(Objection overruled. Exception.)

Q. You can't say that you have the opinion that he was insane?

A. No, sir.

That's all.

Cross-examination by Mr. DILLON:

Have you ever had any trouble with the defendant?

A. No, sir.

That's all.

C. V. LAKE, witness heretofore called by the Government, being recalled on rebuttal, testified as follows on—

Direct examination by Mr. CROSSLEY:

Mr. Lake, you testified in this case yesterday?

379 A. Yes, sir.

Q. How long have you known the defendant, George Matheson?

A. All together, about four or five years.

Q. State to the jury about how well you have known him some three or four years preceeding this crime committed on the 24th of May, 1908.

A. Well, the first two years I only knew him by sight—until, in fact, he came back from California the last time.

Q. When was that?

A. I think it was in 1906—or I think he came back in 1905, I wouldn't be positive.

Q. State to the jury how well you knew him after he came back.

A. Only by meeting him and talking with him occasionally; I never associated with him a great deal, but I met him possibly two or three times a week, and our meetings were agreeable and pleasant.

Q. You were friendly?

A. Yes, sir; always friendly.

Q. Now state to the jury whether or not you ever noticed any particular peculiarities about the defendant.

A. I never did.

Q. That is, which were abnormal?

A. No, I never did; I never was with him enough to form any opinion about that.

Q. Or as to his mental condition as indicated by his acts?

A. Well, not any more than any other individual just meeting them casually.

Q. You saw him on the 24th day of May, 1908?

A. Yes, sir.

Q. State to the jury whether or not his actions on that day were any different from his actions you noticed previous to that.

A. No; he seemed to be going back and forth the same as
380 other people; he didn't have a great deal to say—nobody was talking very much.

Q. Now, from your observations—and this question you may answer by yes or no—you may state to the jury whether you formed any opinion as to his sanity or insanity at or before this tragedy on May 24, 1908.

(Objected to on the ground that no foundation has been laid, this witness having testified affirmatively that he hadn't sufficient acquaintance or association with the defendant to form an opinion.)

The COURT. Objection overruled. The jury may estimate the value of the opinion if he has any.

(Defendant excepts.)

A. I never formed an opinion in regard to it at the time, really.

Q. Then you have no such opinion?

A. No, sir; it never entered my head at the time. If I have any such opinion I have formed it since by thinking it over.

(Defendant moves to strike the answer as incompetent, irrelevant, and immaterial.)

Mr. CROSSLEY (after argument by Mr. Dillon). I withdraw the question. You may state, Mr. Lake, whether in your opinion, from your observation of the defendant and his actions, whether he was sane or insane at that time.

(Objected to, unless it is confined to the time the observations were made.)

The COURT. We will ascertain what, if anything, his opinion was at the time first.

(Defendant excepts.)

A. If you will let me make a little explanation, it is this: At that time I never formed an opinion from just a casual acquaintance in regard to it. But if you wish to know what my opinion is
381 from general observations from that time up to now, what may opinion is now in regard to it from all I have seen and know, I can answer it.

Q. What is it?

A. That he was not insane; that he was sane as far as I observed since I have seen him.

That's all.

Cross-examination by Mr. DILLON:

Since that time you haven't seen him?

A. Since the shooting—no, sir.

Q. You didn't pay any particular attention to him or have any reason to have your attention called to him more than any other man?

A. Not a bit.

Q. And up to that time you hadn't thought much about his mental condition?

A. No, sir; I hadn't given it any thought.

Q. The only thought you have given it is since this offence is alleged to have been committed?

A. Yes; as far as I know on that subject.

Redirect examination by Mr. CROSSLEY:

His actions were not such at the time or previous to that time as to indicate to you that he was of unsound mind, were they?

(Objected to as leading. Objection sustained.)

Q. State whether or not his actions previous and up to that time were such as to indicate to you that he was of unsound mind.

A. No, sir.

That's all.

Mr. DILLON. No further questions.

382 BEN NORVAL, witness on behalf of the Government, having been heretofore called, sworn, and testified, being called in rebuttal, testified as follows on—

Direct examination by Mr. CROSSLEY:

Your name is Ben Norval?

A. Yes, sir.

Q. You testified in this case yesterday morning?

A. I did, sir.

Q. How long have you known the defendant, George Matheson, Mr. Norval?

A. Something like three or four years, I believe.

Q. Three or four years?

A. Yes, sir.

Q. State to the jury how well you have known him.

A. Have been fairly well acquainted with him.

Q. You were? Now state to the jury about how often you saw him during the three or four years previous to this crime on the 24th day of May, 1908.

A. Once a week and sometimes oftener; sometimes perhaps not so often.

Q. How far did you live from where he lived?

A. About three miles, I believe.

Q. Just state to the jury, Mr. Norval, whether or not you noticed any particular abnormal actions on the part of the defendant during that time and up to the 24th day of May, 1908.

A. Yes.

Q. You noticed some particularly abnormal acts, did you? What were they, Mr. Norval? You probably didn't understand just what I meant by abnormal——

A. Yes; I think I understand the word abnormal all right.

Q. Now state to the jury what particular things you noticed about the defendant, if any, in that respect.

383 A. Oh, in his carelessness; I considered he was careless and of a wild nature; careless of everybody and everything, and he apparently cared nothing for himself or nobody else at all whatever.

Q. For what?

A. For himself or any other person—he didn't seem to know what a friend was worth, or relative, or anybody else.

Q. From your observations of him preceding to and at that time, will you state to the jury whether or not, in your opinion, he was sane or insane at the time?

A. Well, I wouldn't call him either sane or insane.

Q. Well, would you say he was insane?

A. Well, he wasn't altogether sane, and he wasn't altogether insane; but I have said many is the time that I thought there was a streak through his block.

Q. Was he high-tempered?

A. Yes; high-tempered, careless, and regardless of everybody.

Q. State to the jury whether or not he was quarrelsome.

A. He was inclined to be quarrelsome.

That's all.

Mr. DILLON. That's all.

384 W. D. TAYLOR, witness heretofore called and sworn on behalf of the Government, being called on rebuttal, testified as follows on—

Cross-examination by Mr. CROSSLEY:

You testified in this matter day before yesterday?

A. I did.

Q. How long have you been acquainted with the defendant, George Matheson?

A. I knew him by sight before he went outside, and pretty well after he came back.

Q. About how often did you see him after he came back, for two or three years preceding the killing?

A. Well, sometimes every day, sometimes every week, and sometimes, perhaps, not for two weeks.

Q. You had an opportunity to observe him pretty closely?

A. O yes; I had plenty of opportunity.

Q. From your observations as to his actions, will you state to the jury whether or not, in your opinion, he was sane or insane at the time?

(Objected to on the ground that no foundation has been laid.)

The COURT. I think you will find, Mr. Dillon, that a different rule obtains on rebuttal. When you are testifying as to a man's sanity, that is a natural condition which is supposed to exist until the contrary is made to appear. When you introduce testimony to show insanity, that is the unnatural state, and the rules which you have discussed apply. Objection overruled.

(Defendant excepts.)

A. Why, I never considered him insane.

That's all.

385 Cross-examination by Mr. DILLON:

Had you considered the matter of his insanity prior to this offence?

A. Not a great deal, no.

Q. Didn't think much about it?

A. No, sir; I noticed several peculiarities about him, but there was never any question in my mind about his sanity.

Q. Did these peculiarities seem to be unnatural?

A. No.

That's all.

JOHN DISTIN, witness called by the Government on rebuttal and thereto first duly sworn, testified on—

Direct examination by Mr. CROSSLEY:

What is your first name, Mr. Distin?

A. John.

Q. What is your occupation, Mr. Distin?

A. Guard at the Federal jail.

Q. How long have you known the defendant George Matheson?

A. Since last April.

Q. What opportunity have you had for observing him, Mr. Distin, and how often have you seen him?

A. Well, I have seen him every day that I have been on shift.

Q. So you have had ample opportunity to observe him, have you, and his actions?

A. Yes; I have been in his company you might say—that is, close to him nearly all the time.

Q. State to the jury whether or not, from your observations of the defendant, that he was sane or insane.

A. I think he was perfectly sane.

That's all.

386 Cross-examination by Mr. DILLON:

Did you ever pay any attention to him with a view to making up your mind whether he was sane or insane?

A. Why, I have since the time that I heard of this trial coming on.

Q. You never before that?

A. I didn't give it any thought before.

Q. You didn't pay much attention to his peculiarities, if he had any, before this trial?

A. No; only as to whether he had any such peculiarities.

Q. Did you ever notice any peculiarities?

A. Yes; he is a man of nervous temperament and high strung, but I conside him a very bright fellow in some ways.

Q. Well, now, in what ways?

A. Well, in talking on some subjects he is quite well posted for a young man.

Q. Well, now, if you say he was bright in some ways, was there other ways that he was not?

A. Of course, I consider a man that lets his temper——

Q. Now, it is facts I want; I don't want your opinion.

A. A man that lets his temper get the best of him is nervous at times—I don't consider him as bright then of course as at other times.

Q. Can you give any instances of his exhibiting temper?

A. I have seen him what we ordinarily term "fly off the handle" a couple of times.

Q. Without any apparent cause for it?

A. Why, no; only his own fault.

Q. Well, now, have you had opportunity to observe that?

A. Why, no; only in fooling, when I thought he had no
387 cause for it, to let his tongue get the best of him.

Q. Do you remember some conversation with me to the effect that you had had trouble with him?

A. I had a few words with him, yes.

Q. Relate to the jury what happened then? And what grew out of it.

(Objected to as not cross-examination. Objection overruled.)

A. Well, I had one of the prisoners opening a case of eggs and there was some of the boys inside asked me for some eggs and I says, "Nothing doing." I says, "I don't want the cook to jump onto me," or words to that effect. And when the prisoner and me took the case out and put it away the prisoner asked me if he could take one egg and I says, "Nothing doing," and I turned around and, even if I do say it myself, I seen the fellow stealing eggs, but I paid no attention to it and let it go at that. I just thought if he wanted an egg that bad, let him have it, and he needn't think I saw him take

it. So George Matheson, when I came in again, jumped all over me and said I had let this fellow take an egg and said I was a pretty cheap guy that would let one man have something and not the others.

Q. Well, did anything more about it come up afterwards?

A. No, sir.

Q. He didn't speak about it afterwards?

A. No, sir.

Q. Didn't he say to you at the time, or didn't you say to me that he asked you why you would do that for the other fellow and not for him?

A. No, sir; I don't remember that.

Q. Do you remember telling me that while over in the hospital?

388 A. No, sir.

Q. All right—that's all.

Mr. CROSSLEY. That is all, Mr. Distin. Thank you.

The Government rests.

Whereupon, after being admonished the jury was excused and retired in charge of their sworn bailiffs as heretofore, and court was adjourned until to-morrow morning at 9.00 o'clock.

FAIRBANKS, *September 11, 1909—9 a. m.*

Whereupon the respective counsel addressed the jury, and the arguments of counsel were concluded at 2.57 p. m. of this day.

And be it further remembered that on said September 11, 1909, at 2.57 p. m., after the testimony was closed and the parties had announced that they each had rested, and after the conclusion of the argument of respective counsel to the jury, the court read to the jury its written instructions upon the law of the case in words and figures as follows, to wit:

389 In the District Court for the Territory of Alaska, Division Number Four.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT.
} No. 331. Criminal.

Instructions to jury.

Gentlemen of the Jury:

I.

The defendant in this case is accused by the indictment herein, and he is now on trial before you, for the crime of murder in the first degree.

The indictment charges that the said George Matheson, on the twenty-fourth day of May, A. D. one thousand nine hundred eight,

at Chicken Creek, in the Territory of Alaska, Third Division (now Fourth Division) (T. R. L.), and within the jurisdiction of this court, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, killed one Gus Lawless, by then and there shooting him, the said Gus Lawless, with a loaded revolver or pistol, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

It is your duty to determine from the evidence in this case whether the accused did kill the said Gus Lawless in manner and form as charged in the indictment; and if you shall find and believe from the evidence in this case, beyond a reasonable doubt, that at the time and place mentioned in the indictment the defendant did voluntarily kill him, the said Gus Lawless, you should further determine from the evidence under the instructions of the court whether he is guilty of the crime charged in the indictment, or a lower degree
390 thereof or any crime necessarily included therein, or whether he was justified or excused by law in so killing him, the said Gus Lawless, and is therefore not guilty.

II.

Your duty to society and to this defendant obligates each of you to give your earnest and careful consideration to every feature of the case, so that the defendant may not be unjustly convicted not wrongfully acquitted. Under the solemnity of your oaths as jurors you must consider all the evidence in the case, and under the instructions of the court as to the law of the case, and upon the law and the evidence you must reach, if you can, a just verdict, which the law and the rights of this defendant demand of you. And in determining the guilt or innocence of the defendant under the evidence it becomes your duty to accept the law of this case as given to you by the court in these instructions.

III.

In this case, as in every criminal case, the jury and the judge of this court have each separate functions to perform. It is your duty to hear all of the evidence, all of which is addressed to you, and thereupon to decide and determine the facts of the case; it is the duty of the judge to decide all questions of law involved in the trial of the case and to instruct you upon the law applicable to the facts and evidence in the case, and the law makes it your duty to accept as law what is laid down as such by the court in these instructions.

IV.

You are instructed that you should not consider any evidence sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken by the court; nor

391 should you consider any knowledge or information known to you not derived from the evidence given by the witnesses on the witness stand in reaching your verdict. You should not allow either prejudice or sympathy to swerve you in reaching a verdict according to the evidence and the law as given to you by the court. Whatever verdict is warranted under the evidence and the instructions of the court, you should return, as you have sworn so to do. The character and degree of the penalty in case of conviction is to be determined by the court within the limit fixed by law, and you are instructed that you should not consider the matter of the penalty, except as you are hereinafter instructed particularly concerning that question.

V.

You are instructed that the defendant in this case is presumed to be innocent of the charge against him as made by the indictment, and of any crime necessarily included therein, and such presumption continues with him until the same is removed by evidence convincing the jury of his guilt beyond all reasonable doubt; and, acting upon this presumption, you should acquit the defendant unless you find that every material element of the crime charged in the indictment of *of* some crime necessarily included therein is proved by the evidence to your satisfaction beyond all reasonable doubt against him.

This presumption of innocence is not a mere form, to be disregarded by the jury at pleasure, but is an essential and substantial part of the law of the land, and binding on the jury in this case.

VI.

The term " reasonable doubt " as defined by the law and as used in these instructions is that state of the case which, after a care-
392 ful comparison and consideration of all the evidence in the case, leaves the minds of the jury in that condition that they cannot feel an abiding conviction, to a moral certainty, of the truth of the charge.

The term reasonable doubt does not mean any doubt, but such a doubt must be actual and substantial as contradistinguished from mere vague apprehension, and must arise out of the evidence or from a want of evidence.

A reasonable doubt is not a mere whim, but is such a doubt as arises from a careful and honest consideration of all the evidence in the case; and the evidence is sufficient to remove a reasonable doubt when it convinces the judgment of ordinarily prudent men of the truth of a proposition with such force that they would act upon the conviction without hesitation in their own most important affairs. The jury is not justified in searching for a doubt for the purpose of acquitting the defendant.

VII.

The burden of proof in this case is upon the United States. The presumptions of law are in favor of the innocence of the defendant. And if, after carefully and impartially considering all of the evidence in this case, you still entertain a reasonable doubt of the defendant's guilt, you should resolve that doubt in his favor and acquit him.

VIII.

There is some evidence in this case that the defendant made oral admissions to persons who have appeared as witnesses in this case and testified to the same. You are instructed that owing to the infirmity of the human (mind) (T. R. L.) and the inability of witnesses to repeat the exact language used by the defendant and to understand it correctly and repeat it with it's intended meaning, you are to view the evidence as to such oral admissions so
393 alleged to have been made by the defendant with caution; but if you shall find and believe from the evidence beyond a reasonable doubt that the oral admissions so testified to were so made by the defendant, you should consider them as candidly and fairly as any other evidence in the case.

IX.

You are instructed that you are the sole judges of the effect of the evidence, and of the weight to be given to the testimony of the witnesses; but your power in that respect is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence.

In considering the evidence in this case you are not bound to find a verdict in conformity with the declarations or testimony of any number of witnesses when their evidence does not produce conviction in your minds, against a less number of witnesses, or other evidence, which is satisfying to your minds. The weight of the evidence does not depend so much upon the number of witnesses who testify as upon the character and probability of the facts stated, and upon the character and reasonableness of the testimony, and the opportunity the witnesses had of seeing and knowing the facts stated by them.

If you find that any witness has wilfully testified falsely in one part of his testimony in this case, you may distrust any part or all of the testimony of such witness; and, if you believe from the evidence that any witness has wilfully testified falsely in this case, you are at liberty to reject all or any part of the testimony of such witness; but you are not bound to do so. You should reject the false part, and should give such weight to the other parts as you think they are justly entitled to receive. You should not fail to weigh and consider
394 fairly and give proper effect to all evidence in the case which you consider truthful.

X.

You are further instructed that evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and therefore, if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory (evidence) (T. R. L.) was within the power of the party (offering the same) (T. R. L.) the evidence offered should be viewed with distrust.

XI.

In determining as to the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into account the conduct and appearance of the witness upon the stand; the interest he has, if any, in the result of the trial; the motive he has in testifying, if any is shown; his relation to or feeling for or against the defendant; the probability or improbability of such witness' statements and the opportunity he had to observe and to be informed as to the matters respecting which he gave testimony; and the inclination he evinced, in your judgment, to speak the truth, or otherwise, as to the matters within the knowledge of such witness.

It is your duty to give to the testimony of each and all of the witnesses such credit as you consider such testimony justly entitled to.

XII.

You are instructed that a person charged with the commission of a crime shall, at his own request, but not otherwise, be deemed a competent witness; but his waiver of such right to testify as a wit-
395 ness in his own behalf shall not create any presumption against him. And you are instructed that the defendant's waiver of his right to testify as a witness in his own behalf in this case does not create any presumption against him (and you should not indulge in any presumption against him on that account) (T. R. L.).

XIII.

You are instructed that in every criminal prosecution, two propositions at least must be established: First, that a criminal act has been committed, and second, that the defendant on trial is the person who committed such criminal act. Each of these propositions must be established to your satisfaction beyond all reasonable doubt, by either direct or circumstantial evidence. The proof of both propositions must be clear and distinct, but it is not necessary that it should be direct and positive. Both facts and propositions may be established by circumstantial evidence, providing such evidence establishes such propositions in the minds of the jury beyond a reasonable doubt.

The jury is not bound to rely solely upon either direct testimony or circumstantial evidence; but you should consider the testimony in the light of all the circumstances proved on the trial, and draw your conclusions therefrom, as you would in arriving at any conclusion in the graver affairs of life; and if, after considering all the evidence in this case, you are satisfied in your minds beyond all reasonable doubt that the defendant is guilty, then it is your duty to so declare by your verdict; but if you are not so satisfied, it will be your duty to return a verdict of not guilty, as you shall be hereinafter instructed.

XIV.

MURDER IN THE FIRST DEGREE.

You are instructed that whoever, being of sound mind (memory) (T. R. L.) and discretion, purposely, and of deliberate and pre-
396 meditated malice, kills another, is guilty of murder in the first degree.

In this degree of felonious homecide, you must find from the evidence beyond all reasonable doubt that the defendant committed the act; that is, that the defendant George Matheson killed the deceased Gus Lawless, that the defendant at the time was of sound mind (memory and) (T. R. L.) & discretion, and that such killing was done purposely and with deliberate and premeditated malice. If either or any of these elements be absent, there cannot be a conviction for murder in the first degree.

"Purposely" as used in these instructions, means intentionally. "Deliberate and premeditated malice" means malice resulting from thought and reflection.

"Malice" in law and as used in the statute defining murder has a technical meaning, including not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. Malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart. And in a case of homicide the law presumes malice from the use of a deadly weapon, unless the evidence which proves the killing shows that it was perpetrated without malice. Therefore, unless the evidence in this case shall show that the alleged act of the defendant was perpetrated without malice as defined in these instructions, you are justified in presuming malice from the use of such weapon.

"Premeditated malice" is where the intention to take life unlawfully is deliberately formed in the mind of the actor before the fatal stroke is given. There need be no appreciable length of time
397 between the formation of the intent to kill and the killing itself; it may be as instantaneous as successive thought. It is only necessary that the act of killing should have been preceded by the concurrence of will, deliberation, and premeditation upon the part of the slayer. And before you can find the defendant guilty

of murder in the first degree, you must also find from the evidence beyond all reasonable doubt that the defendant, at the time he killed the deceased Gus Lawless, was a man of sound memory and discretion, and a sane and responsible person.

XV.

It is your duty to ascertain and determine from all the evidence in this case whether or not the defendant George Matheson killed the deceased Gus Lawless at the time and place charged in the indictment; and if you do find and believe from all the evidence in this case beyond a reasonable doubt that the defendant George Matheson did kill the said Lawless at said time and place, then it becomes your duty to determine whether or not such killing was done purposely and of his deliberate and premeditated malice.

XVI.

If you find and believe from the evidence in this case beyond all reasonable doubt that the accused George Matheson did, at the time and place alleged in the indictment, being then and there of sound memory and discretion and a sane and responsible person, purposely, and of his deliberate and premeditated malice, killed the deceased, you should find the defendant guilty of murder in the first degree.

XVII.

398 You are instructed that the crime of murder consists of two degrees, first and second; and you are further instructed that upon an indictment for a crime consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment and guilty of any inferior degree of the crime charged necessarily included therein.

You are instructed, however, that this is not an arbitrary power or right on your part, to be exercised or withheld at pleasure, but it is a legal duty, to be exercised in strict conformity with the rules of law. In this case, if the evidence is such as to convince you beyond all reasonable doubt that the defendant is guilty of the crime of murder in the first degree as defined in these instructions, then you (would) (T. R. L.) have no right to refuse to convict for that degree, either through sympathy or otherwise and to return a verdict of a lesser degree or of a lower offence.

It is the duty of the prosecution to prove every allegation of the crime beyond all reasonable doubt; but if that be done in this case, it is equally your duty to give full effect to that evidence, and render your verdict accordingly.

XVIII.

MURDER IN THE SECOND DEGREE.

You are instructed that whoever, purposely and maliciously, but without deliberate and premeditated malice, kills another is guilty of murder in the second degree.

In this degree of felonious homicide the evidence must show to the satisfaction of the jury beyond all reasonable doubt, that the defendant George Matheson did kill the deceased Gus Lawless at the time and place laid in the indictment, and that he did so purposely and maliciously; and that at the time of such killing he was of sound mind and discretion. If either or any of these ele-
399 ments be not established, there can be no conviction for murder in the second degree.

"Purposely" as used in these instructions means intentionally. "Maliciously" means that it was done wrongfully and intentionally through anger, hatred, or revenge or any other unlawful or unjustifiable motive.

If you shall find and believe from the evidence in this case beyond all reasonable doubt that at the time and place charged in the indictment the defendant, George Matheson, being then and there of sound mind and discretion, did then and there purposely and maliciously kill the said Gus Lawless under such circumstances as not to constitute murder in the first degree, then you should find him guilty of murder in the second degree.

XIX.

You are further instructed that while the defendant in this case is charged by the indictment with murder in the first degree, the law provides that in all cases the defendant may be found guilty of any crime the commission of which is necessarily included within that with which he is charged in the indictment, and you are instructed that the crime of manslaughter is necessarily included within the indictment herein.

XX.

You are instructed that your power to find the defendant guilty of a lesser offence necessarily included within the greater is not an arbitrary power, to be exercised or withheld at your pleasure, but it is a duty to be exercised by you in strict conformity with the rules of law. In this case if you shall find and believe from the evidence beyond all reasonable doubt that the defendant is guilty either of murder in the first degree or murder in the second degree, as
400 heretofore defined in these instructions, it is your duty to return that verdict, and you would have no right to find the defendant guilty of the lesser offence of manslaughter in such event,

XXI.

MANSLAUGHTER.

You are instructed that whoever unlawfully kills another, except under such circumstances as to constitute murder either in the first or second degree, is guilty of manslaughter.

XXII.

The court instructs the jury that manslaughter is the unlawful killing of another without malice, and may be either voluntary, as where the act is committed with a real design and purpose to kill, but through the violence of sudden passion occasioned by some great provocation, which, in tenderness for the frailty of human nature, the law considers sufficient to palliate the criminality of the offence, or involuntary, as where the death of another is caused by some unlawful act not accompanied with any intention to take life.

XXIII.

The court instructs the jury that where a voluntary homicide takes place under the influence of sudden passion, and no cause exists which will in law justify or excuse its commission, the true test to determine whether such homicide is manslaughter or murder in the second degree is: (Was there adequate cause to produce such passion?) (T. R. L.) If there was such adequate cause, the homicide will be manslaughter. If there was not such adequate cause, the homicide will be murder in the second degree.

By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection. In order to reduce a voluntary killing to the grade of manslaughter it is necessary not only that an adequate cause exist to produce the degree of anger, rage, resentment, or terror sufficient to render the mind incapable of cool reflection, but also that such state of mind did actually exist at the time of the commission of the offence.

401

XXIV.

The court instructs the jury that a reasonable time within which the law presumes that the blood has cooled and the angry passion aroused by the provocation has subsided, is the time within which an ordinary, reasonable man would cool under like circumstances. In applying this test all circumstances attending the homicide are to be taken into consideration, including the nature and extent of the provocation, the physical and mental condition of the defendant, his condition in life and peculiar situation at the time of the homi-

cide, his education and habits, and his conduct, manner, and conversation throughout the altercation. In a word, all pertinent circumstances may be considered, and the time in which an ordinary man in like circumstances would have cooled, is the reasonable time.

XXV.

You are instructed that the law of Alaska declares that the killing of one person by another is sometimes excused or justified, and it defines nine classes of such lawful and excusable killing.

You are instructed that the killing of a human being is justified, and therefore lawful, when committed by public officers and those coming to their aid and assistance and by their command, either (1) in obedience to the judgment of a competent court; (2) when necessarily committed in overcoming resistance to the execution of
402 legal process or in the discharge of a legal duty; (3) when necessarily committed in retaking persons charged with or convicted of a crime who have escaped or been rescued; (4) when necessarily committed in resisting a person fleeing from justice who had committed a felony.

You are instructed that the killing of a human being is also justified, and therefore lawful, when committed by any person as follows: (5) To prevent the commission of a felony upon such person, or upon his or her husband, wife, parent, child, master, mistress, or servant; (6) to prevent the commission of a felony upon the property of such person, or upon property in his possession or upon or in any dwelling house where such person may be; (7) in the attempt, by lawful ways and means, to arrest a person who has committed a felony, or in a lawful attempt to suppress a riot or preserve the peace.

You are further instructed that the killing of a human being is excusable, and therefore not unlawful, when committed (8) by accident or misfortune in lawfully correcting a child, or in doing any other lawful act by lawful means with usual and ordinary caution and without any unlawful intent, and (9) by accident or misfortune in the heat of passion, upon a sudden and sufficient provocation or upon a sudden combat, without premeditation and undue advantage being taken, and without any dangerous weapon or thing being used, and not done in a cruel and unusual manner.

XXVI.

You are instructed that any other killing of one person by another than those which are justifiable and excusable, as particularly described in the above nine classes, is an unlawful killing.

403 And if you shall find and believe from the evidence in this case, beyond all reasonable doubt, that the defendant George Matheson, at the time and place charged in the indictment in this action, and being then of sound mind and discretion, did kill the said Gus Lawless under circumstances not bringing such killing under

one or more of the above described nine classes, then you are instructed that such killing constituted either murder in the first degree, murder in the second degree, or manslaughter; and you should return your verdict accordingly, and (in) (T. R. L.) pursuance to the instructions given you in this case.

XXVII.

If you shall find and believe from the evidence in this case beyond all reasonable doubt that at the time and place mentioned in the indictment the defendant George Matheson, being then and there a sane and responsible person, did unlawfully kill the said Gus Lawless under such circumstances as not to constitute either murder in the first degree or murder in the second degree, but did kill him unlawfully, then you should find him guilty of manslaughter.

XXVIII.

The defendant in this case is accused by the grand jury and is now on trial before you for the crime of murder in the first degree, for the alleged killing of one Gus Lawless at the time and place mentioned in the indictment.

To this charge the defendant has pleaded "not guilty." You are instructed that such a plea puts in issue every material allegation of the indictment, and puts the burden of proof upon the prosecution to prove every such allegation to the satisfaction of the jury beyond all reasonable doubt; and until the prosecution proves every
404 material allegation constituting the crime charged against the defendant or any crime necessarily included therein as defined in these instructions, beyond all reasonable doubt, the defendant is entitled to the continued benefit of the presumption of his innocence.

If you find and believe from the evidence in this case beyond all reasonable doubt that the defendant George Matheson killed the deceased Gus Lawless under such circumstances as to make it murder in the first degree or second degree, and there is reasonable ground for doubt in which degree, first or second, he is guilty, he can be convicted of the lesser or second degree only. And if you are satisfied and believe from the evidence in this case beyond a reasonable doubt that the defendant killed the deceased Lawless under such circumstances as do not constitute murder in the first degree, but do constitute murder either in the second degree or manslaughter, and there is reasonable ground for doubt whether the crime is murder in the second degree or manslaughter, then the defendant can be convicted of the lesser crime of manslaughter only.

XXIX.

You are instructed, however, that this power of fixing the degree of the crime is not an arbitrary one, to be exercised by you or withheld at your pleasure, but is a legal and solemn duty which you owe

both to the United States and to the defendant in this case, and one which should be exercised by you in conformity with the rules of law as given to you in these instructions.

If you find and believe from the evidence in this case beyond all reasonable doubt that the defendant is guilty of murder in the
405 first degree, you should say so by your verdict; if from the evidence you are convinced beyond all reasonable doubt that the defendant is guilty of murder in the second degree only, you should say so by your verdict; if you are satisfied from the evidence beyond all reasonable doubt that the defendant is guilty of the crime of manslaughter you should say so by your verdict. But if you do not find and believe from the evidence in this case beyond all reasonable doubt that the defendant is guilty of either or any of these enumerated offences, or, if you have a reasonable doubt upon the question, then you should find him not guilty.

XXX.

You are further instructed that if you find and believe from the evidence in this case that a felonious homicide has been committed in this case, of which you are to be the judges, there is nothing in this case to reduce it below the crime of manslaughter; and, under the evidence, you should find the defendant guilty of murder in the first degree, guilty or murder in the second degree, guilty of manslaughter, not guilty by reason of insanity, or not guilty.

XXXI.

You are instructed that the law of Alaska provides that in all cases where a defendant is accused, tried, and found guilty of murder in the first degree, the jury may qualify their verdict by adding thereto the words "without capital punishment," and whenever a jury returns a verdict so qualified the person convicted shall be imprisoned in the penitentiary at hard labor for life; and if you return a verdict of murder in the first degree without so qualifying it the penalty shall be death.

XXXII.

You are instructed that the indictment in a criminal case is of itself a mere accusation against the defendant, and is not of
406 itself any evidence of the defendant's guilt; and no juror should permit himself to be to any extent influenced against the defendant because of or on account of the indictment in this case. The law does not require of the defendant that he prove himself innocent, but he is presumed to be innocent, and the law imposes upon the prosecution the burden of proving that the defendant is guilty in manner and form as charged in the indictment to the satis-

faction of the jury beyond all reasonable doubt, or in like manner that he is guilty of some crime necessarily (included) (T. R. L.) within that charged in the indictment; and unless the prosecution has so done the jury should find the defendant not guilty.

XXXIII.

You are instructed that, if you find and believe from the evidence, beyond all reasonable doubt, that on or about an hour and a half (or two hours) (T. RL.) prior to the shooting of the deceased Lawless by the defendant Matheson (if you find that such shooting took place), in the building known as Struck & Van Hook's saloon, on Chicken Creek, the defendant George Matheson was making an attack on the witness Joe Lawless, while the said witness Joe Lawless was in a drunken condition and unable to protect himself from such attack, the deceased Gus Lawless realised that his brother was in a helpless condition and about to be beaten by the defendant Matheson and that the deceased Gus Lawless voluntarily entered into a fight with the defendant Matheson, for the purpose of resisting the attack of defendant Matheson upon witness Joe Lawless, then and in that case the deceased Gus Lawless, as a brother of witness Joe Lawless, had a perfect right to resist such attack and to repel force with force until he had overcome his assailant, and in so doing he had the same right of self-defence as the witness Joe Lawless under those
407 circumstances, had the said witness, Joe Lawless, been in a condition to exercise that right in his own behalf.

XXXIV.

You are instructed that, if you find and believe from the evidence in this case beyond all reasonable doubt, that the defendant George Matheson and the deceased Gus Lawless had a quarrel or personal conflict in the place known in the evidence as Struck & Van Hook's saloon, at Chicken Creek, at the time mentioned in the indictment, and that thereafter and when the said quarrel or conflict was concluded and within about an hour and a half or two hours thereafter, the defendant Matheson procured a loaded revolver or pistol in the said Struck & Van Hook's saloon, and remarked at said time after firing off said pistol into the floor, that he guessed that would do, and the said defendant Matheson immediately left the said premises of the Struck saloon and proceeded to the post office or road house owned by the said Struck and run by one Scott Holbrook, where the deceased Lawless was at the time immediately after having taken his supper at said road house, and that the said defendant, although warned and urged by various persons who have testified as witnesses in this case that he should not go to the said post office or road house to have any trouble or pick any quarrel with the said Gus Lawless, did proceed to said road house wherein the said Lawless was at the time, and as soon as he had entered said road house

through the front door thereof immediately discharged a loaded revolver or pistol at said Gus Lawless three successive times, maliciously and purposely and with deliberate and premeditated malice, and with intent then and there to kill the said Gus Lawless, and that said third shot did kill the said Lawless; or if you find and believe
from the evidence in this case beyond all reasonable doubt
408 that the said defendant, George Matheson, for the purpose of
wreaking vengeance on the said Gus Lawless, procured such loaded revolver or pistol and went to the said road house wherein the said Lawless was at that time, and purposely and maliciously and with deliberate and premeditated malice, discharged the said loaded revolver at and into the body of the said Gus Lawless, with intent then and there to kill him, the said Gus Lawless, in a spirit of revenge, and that said third shot did kill said Lawless, then you should find the defendant guilty as charged in the indictment.

You are further instructed that it makes no difference who was the aggressor in the quarrel or conflict had between the deceased Lawless and the defendant George Matheson in the said Struck's saloon, if you find that they had such quarrel or conflict prior to the time, the defendant after procuring the said loaded revolver or pistol in said saloon proceeded maliciously and purposely and with deliberate and premeditated malice in his mind to the post office or road house where the said Gus Lawless was at that time located, and with intent to kill the said Gus Lawless, and that he did then and there kill the said Lawless, if you find from the evidence beyond all reasonable doubt that the defendant did leave the said Struck & Van Hook's saloon building so armed and for such purpose, then and in that event you should find the defendant guilty as charged in the indictment.

XXXV.

In this case one of the defences offered on behalf of the defendant is that at the time of the killing of the said Gus Lawless on May 24th, 1908, the defendant George Matheson was insane and not responsible for his acts.

You are instructed that the defence of insanity is one justified both
by the law and the considerations of humanity, and as much
409 entitled to your fair consideration as any other. It is not to
be used as a subterfuge to free the guilty man from the just punishment of his crime; but, when proper, it is a shield which the jury should not hesitate—and it is their duty—to place between the unhappy sufferer from real insanity and the penalty for an act which was beyond his control.

XXXVI.

You are further instructed that the term "insanity" used in these instructions means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of dis-

tinguishing between right and wrong at the time of the commission of the act, or unconscious at the time of the nature of the act, or when, though conscious of the act and able to distinguish right from wrong and know that the act is wrong, yet his will (by which is meant the governing power of his mind) has been so completely destroyed that his actions are not subject to it but are beyond his control.

XXXVII.

The court instructs the jury that the nature, character, and degree of insanity which exonerates a party from criminal responsibility is not easily explained or understood.

It is not necessary that it should be shown by the evidence that the defendant, at the time of the commission of the act, did not know right from wrong as to his acts in general. The inquiry must be directed to the act charged; and if you believe that the defendant's act in shooting Gus Lawless (if he did shoot him) was caused by mental disease or unsoundness, which dethroned his reason or judgment with respect to that act, which destroyed his will power rationally to realize the nature and consequences of the act, and which, overpowering his will, inevitably forced him to its commission, then he is not guilty in law of any crime, and your verdict as to this
410 defendant should be "Not guilty by reason of insanity."

But if you believe, from all the evidence and circumstances in the case, that the defendant was in the possession of a rational intellect or sound mind, and from some real or fancied injury he allowed his passion to escape control, then, though passion or revenge may for the time have driven reason from its seat and usurped it and urged the defendant, he cannot claim for such acts the protection of insanity.

The practical question for you to determine from all the evidence is, Whether passion and revenge or insanity was the ruling force and controlling agency which lead to the commission of this act. If you believe that the shooting was the direct result or offspring of insanity, you should acquit; if of passion or revenge, you should convict.

You should indulge in no prejudice against the defense, but give it thoughtful, thorough, and dispassionate consideration; and yet the interests of society and the welfare of the United States demand that this defence ought not to be regarded as sufficient to exculpate, unless you believe from the evidence that the propensity to commit the act existed in such violence as to subjugate the intellect, control the will, and render it impossible for the defendant to do otherwise than to yield to the insane impulse. In other words, it should appear not only that the mind of the accused was insane, but that the act for which he is indicted was the direct offspring of such insanity.

The jury are instructed that the rule is, where insanity is interposed as a defence to the crime charged, the sanity of the defendant

is a necessary ingredient in the commission of the crime, without which no crime can be committed; and where insanity is re-
411 lied on as a defence in a *in a* prosecution for crime within this rule, and evidence is given tending to show it, and a reasonable, well-founded doubt is thereby raised of the sanity of the accused, he is entitled to the benefit of the doubt.

XXXVIII.

The jury are further instructed that they should consider all of the evidence offered in this case as to the mental condition of the accused, both before and after the commission of the crime charged in the indictment, for the purpose of enabling the jury to arrive at and determine his mental condition at the time the act charged was committed; and, if you believe from the evidence that the defendant was insane at the time the crime charged in the indictment was committed, your verdict should be "Not guilty by reason of insanity."

XXXIX.

You are instructed that every person charged with crime is presumed to be sane; that is, of sound memory and discretion, until the contrary is shown by proof. So far as the matter of sanity is concerned, it is ordinarily satisfactorily sustained by the presumption that every person of sufficient age is of sound mind, and understands the nature and consequences of his acts.

No act done in a state of insanity can be punished as an offence. The question of the insanity of the defendant has exclusive reference to the act with which he is charged at the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by law; if he was insane at the time of the commission of the act, he is entitled to be acquitted.

412 A safe and reasonable test, is that whenever it shall appear from all of the evidence that at the time of committing the act the defendant was sane, and this conclusion is proved to the satisfaction of the jury, taking into consideration all the evidence in the case, beyond a reasonable doubt, he will be held amenable to law. Whether the insanity be general or partial; whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind, proved to be diseased, a person reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists. But, if you find from all the evidence in the case beyond all reasonable doubt, taking into consideration the plea that the defendant was insane at the time of the commission of the crime, that the defendant committed the act with which he is charged, and that he was sane at that time, on the twenty-fourth day of May, 1908, then you should find him guilty of the crime charged in the indictment, or of some other crime necessarily included therein as defined in these instructions.

XL.

You are instructed that the burden is upon the Government throughout the entire case to prove every essential element of the crime charged; and if you should have a reasonable doubt, taking into consideration all the evidence in this case, that the defendant Matheson was sane at the time of the commission of the act charged, you should acquit him.

The real test of liability or nonliability rests upon the proposition whether, at the time the homicide was committed, Matheson had a diseased brain; and that it was not partially diseased or to some extent diseased, but diseased to the extent that he was incapable of forming a criminal intent, and that the disease had so taken charge of his brain, and had so impelled it that, for the time being, his will power, judgment, reflection, and control of his mental faculties were impaired to such a degree that he was not accountable at the time he committed the act. If his brain was in this condition, he cannot be punished by law; but if his brain was not in this condition, he can be punished by law.

By that term it is not meant that he was of perfectly sound mind, but that he had sufficient mind to know right from wrong and to know that the act he committed, at the time he was performing it, was a wrongful act, in violation of human law, and that he could be punished therefor; and that he did not perform the act at a time when he was of unsound mind or insane. In that state of the case the defendant cannot be excused on the ground of insanity, and it would be your duty to convict him.

But if you find from the evidence, or have a reasonable doubt in regard thereto, that his brain, at the time he committed the act, was impaired by disease and that he was insane, and that the homicide was the product of such disease and insanity, and that he was incapable of forming a criminal intent, and that he had no control over his faculties and will power to control his actions, in that event he would be entitled to acquittal.

But you are instructed that within the legal definition of insanity the defendant was responsible for his acts if at the time of the commission of the crime he was of sufficient mental capacity to understand its nature and quality and that the particular act in question was wrong and a violation of the law of the land, for which he would be amenable to punishment under that law. And if you find from all the evidence in the case, beyond a reasonable doubt, that he was of such mental capacity, then and in that case you should not acquit him on the ground of insanity.

XLI.

The law presumes that every man is sane until the contrary appears, and the law presumes the defendant in this case to be sane until the evidence in the case indicates the contrary or raises a rea-

sonable doubt in the minds of the jury as to the sanity of the defendant at the time he killed the said Gus Lawless, if you find from the evidence, beyond all reasonable doubt, that the defendant did kill the said Lawless at the time and place charged in the indictment herein.

If, from all the evidence in this case, you shall find and believe beyond a reasonable doubt that the defendant, George Matheson, did, on the 24th day of May, A. D. 1908, shoot and kill the deceased Gus Lawless in the manner and form charged in the indictment, or under such circumstances as constitute murder in the first or second degree or manslaughter, as hereinbefore explained to you, and that at the time of the commission of such act the defendant knew that it was wrong to commit such act and was mentally capable of choosing to do or not to do the act producing the death of said Gus Lawless and of governing his conduct in accordance with such choice, and was then a person of sound memory and discretion and sane and responsible for his acts, then it is your duty under the law to find him guilty either of murder in the first degree, murder in the second degree, or manslaughter.

You are instructed that the law requires something more
415 than an occasional oddity or peculiarity to exempt the perpetrator of an offence from its punishment. If the defendant was in possession of reason, thought, intent, a faculty to distinguish the nature of actions, and was able to discern the difference between moral good and evil, then the fact of the offence and the condition of mind above described being proved beyond a reasonable doubt, your verdict should not excuse the defendant on the ground of insanity. You are instructed that if one charged with crime have the mental capacity to distinguish right from wrong in respect to the particular act charged, he is responsible.

XLII.

In conformity with the law I have provided six forms of verdict which you will take with you into your jury room; and when you shall have unanimously agreed upon your verdict, you will sign by your foreman that form on which you have agreed and return it into court as your verdict, and the other forms you shall destroy. The forms are:

1. Guilty of murder in the first degree.
2. Guilty of murder in the first degree qualified by the words "without capital punishment."
3. Guilty of murder in the second degree.
4. Guilty of manslaughter.
5. Not guilty, with the added words "by reason of insanity."
6. Not guilty.

With these forms I now hand you the instructions which I have just read to you for your guidance, and you may take them with you

into your jury room and return them with your verdict into this court.

Dated and given at Fairbanks this Sept. 11, 1909.

THOMAS R. LYONS, *Judge.*

416 (Endorsed:) No. 331. Criminal. In the District Court for the Territory of Alaska, 4th Div. United States vs. George Matheson, deft. Instructions to jury. Filed in open court Sep. 11, 1909. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, clerk, by E. A. Henderson, deputy. Each and every page of the foregoing instructions are endorsed on the margain thereof, to-wit, "Given September 11th, 1909. Thomas R. Lyons, judge."

417 In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES *vs.* GEORGE MATHESON. } No. .

Instructions requested by the defendant.

1.

One of the defnces interposed in this case is that of the insanity of the defendant, George Matheson, at the time of the commission of the act complained of in the indictment. The court instructs the jury that the nature, character, and degree of insanity, which exonerates a party from criminal responsibility, is not easily explained or understood. It is not necessary that it should be shown by the evidence that the defendant, at the time of the commission of the act, did not know right from wrong, as to his acts in general. The inquiry must be directed to the act charged; and, if you believe that the defendant's act in shooting Gus Lawless (if he did shoot him) was caused by mental desease or unsoundness, which dethroned his reason or judgment with respect to that act, which destroyed his power rationally to realize the nature and consequences of the act, and which, overpowering his will, inevitably forced him to its commission, then he is not guilty in law of any crime, and your verdict as to this defendant should be "Not guilty" by reason of insanity.

But if you believe from all the evidence and circumstances in the case that the defendant was in the possession of a rational intellect or sound mind, and from some real or fancied injury he allowed

418 his passion to escape control, then though passion or revenge may for the time have driven reason from its seat and usurped it, and urged the defendant, he cannot claim for such acts the protection of insanity, and he is guilty.

"But insanity produced by wrath or jealousy would operate as an excuse for crime to the same extent as any other kind of insanity."

People v. Fry, 138 N. Y., 664; 34 N. E., 396.
States v. Shippey, 88 Am. Dec., 70.
U. S. v. Young, 25 Fed., 710.
See also Wharten & Stille's Med. Juris., vol. 1, page 177 and footnotes.

The practical question for you to determine, from all the evidence is, whether passion and revenge or insanity was the ruling force and controlling agency which lead to the commission of this act. If you believe that the shooting was the direct result of offspring of insanity, you should acquit; if of passion or revenge, you should convict. You should indulge in no prejudice against the defense, but give it thoughtful, thorough and dispassionate consideration, and yet the interest of society and the welfare of the State demand that this defense ought not to be regarded as sufficient to exculpate unless you believe, from the evidence, that the propensity to commit the act existed in such violence as to subjugate the intellect, control the will, and render it impossible for the defendant to do otherwise than to yield to the insane impulse. In other words it should appear not only that the mind of the accused was insane, but that the act for which he is indicted was the direct offspring of such insanity.

(Charged. T. R. L., Judge.)

419 2.

REASONABLE DOUBT OF INSANITY.

The jury are instructed that the rule is, where insanity is interposed as a defense to the crime charged, the sanity of the defendant is a necessary ingredient in the commission of the crime, without which no crime can be committed—

(Charged. T. R. L., Judge.)

"Chase v. People, 40th Ill., 353.
Hopps v. People, 31 Ill., 385; 83 Am. Dec., 321.
People v. McCann, 16 N. Y., 58; 69 Am. Dec., 6422."

and where insanity is relied upon as a defense in a prosecution for crime within this rule, and evidence is given tending to show it, and a reasonable, well-founded doubt is thereby raised of the sanity of the accused, he is entitled to the benefit of the doubt—

(Charged. T. R. L., Judge.)

"Davis v. U. S., 160 U. S., 469; 40 L. Ed., 499; 16 Sup. Ct. Rep., 353.
German v. U. S., 57 cx., a. 128; 120 Fed., 666."

the burden of proof, where sanity is questioned, resting with the prosecution to establish sanity beyond a reasonable doubt—

"Maas v. Territory, 63 Pac., 960.
Davis v. U. S. (as above quoted)."

and the defendant is to be acquitted unless the jury are satisfied beyond a reasonable doubt that the criminal act was not produced by mental decease.

"A prisoner charged with murder is entitled to an acquittal if the jury entertain a reasonable doubt as to his soundness of mind at the time of the homicide, although they believe that he had judgment and reason sufficient to discriminate between right and wrong in the ordinary affairs of life."

"Stevens v. State, 31 Ind., 485; 99 Am. Dec., 634."

It is not necessary, under this rule, that insanity be established by a preponderance of the evidence—

"State v. Shuff (Idaho), 72 Pac., 664."

or beyond a reasonable doubt.

"People v. McCann, 69 Am. Dec., 642."

Sanity is presumed, however, and the prosecutor may rest
420 such presumption without other proof; but, upon the general question whether the crime committed was committed by a person responsible for his acts, the presumption of sanity and the evidence are both to be considered, the affirmative resting with the prosecution; and if a reasonable doubt exists as to whether the person was sane, he should be acquitted—

"Guiteau case, 10th Fed., 161."

and it is immaterial whether the evidence tending to show insanity was adduced by the prosecution or the defense.

(See also section 316, page 352, of Wharton and Stille's Medical Juris., vol. 1, and the footnotes and cases cited in connection therewith.

(Charged in substance. T. R. L., Judge.)

421 No. 3.

You are further instructed that the definition of a "reasonable doubt," as contained in these instructions, apply as well to the fact of the sanity of the defendant as to any other material fact in the case, and a reasonable doubt as to the sanity of the defendant on trial for the crime charged is a reasonable doubt of his guilt and entitles him to an acquittal.

(See authorities cited under instruction No. 2; also footnote 77 to sec. 316 of Wharton & Stille's Med. Jurisp., p. 354.)

(Charged by T. R. L., Judge, in other language.)

No. 4.

The jury are further instructed that they should consider all the evidence offered in this case as to the mental condition of the accused, both before and after the commission of the crime charged in the indictment, for the purpose of enabling the jury to arrive at and determine his mental condition at the time the act charged was committed; and if you believe, from the evidence, that the defendant was

insane at the time the crime charged in the indictment was committed, your verdict should be "Not guilty," by reason of insanity.

(See section 321, Wharton & S. Med. Jur. and footnotes and authorities cited thereunder.)

(Charged. T. R. L., Judge.)

422 6.

The jury are further instructed that Carter's Annotated Codes of Alaska, part two, chapter 17, section 163, page 72, reads as follows:

"Proceedings when defendant acquitted on account of insanity:

"That if the defense be the insanity of the defendant the jury must be instructed, if they find him not guilty on that ground, to state that fact in their verdict; and the court must thereupon, if he deems his being at large dangerous to the public peace or safety, order him to be committed to any lunatic asylum authorized by the United States to receive and keep such persons until he become sane, or be otherwise discharged therefrom by authority of law.

"Laws Oreg., Oct. 19, 1864; Hill's An. Laws, s. 1389."

(Given in part and refused in part. T. R. L., Judge.)

7.

The jury are instructed that "murder in the first degree" is defined by part 1, chapter two, section three of Carter's Annotated Codes of Alaska, as follows:

"That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death."

(Charged. T. R. L., Judge.)

423 8.

The jury are instructed that "Murder in the second degree" is defined in part 1, chapter 2, sec. 5, of said Codes of Alaska, as follows:

"That whoever purposely and maliciously, except as provided in sections 3 and 4 hereof, kills another is guilty of murder in the second degree, and shall be imprisoned in the penitentiary not less than 15 years."

(Charged. T. R. L., Judge, in substance.)

9.

DEFINITION OF MANSLAUGHTER.

The court instructs the jury that manslaughter is the unlawful killing of another without malice and may be either voluntary, as where the act is committed with a real design and purpose to kill, but

through the violence of sudden passion occasioned by some great provocation, which in tenderness for the frailty of human nature, the law considers sufficient to palliate the criminality of the offense, or involuntary, as where the death of another is cause' by some unlawful act not accompanied with any intention to take life.

"State *v.* Thomas, 78 Mo., 327.
Com. *v.* Webster, 5 Cush. (Mass.), 295."

(Charged. T. R. L., Judge.)

424 10.

DISTINCTION BETWEEN MURDER AND MANSLAUGHTER.

The court instructs you that from the definition given, it will be perceived that the characteristic distinction between murder and manslaughter is the existence of malice, express or implied. It therefore becomes necessary in every case of homicide to ascertain with some precision the nature of legal malice and what evidence is requisite to establish its existence. The rule is that the implication of malice arises in every case of intentional homicide, and the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity are to be established by the party charged, unless they arise out of the evidence produced against him to prove the homicide, where the fact of killing is proved by satisfactory evidence, and there are no circumstances disclosed tending to show justification or excuse, and there is nothing to rebut the natural presumption of malice. This rule is founded on plain and obvious principles that a person must be presumed to intend that which he voluntarily and willfully does, and that he must intend all the natural, probable, and usual consequences of his own acts. On the other hand, if death, though willfully intended, appears to have been inflicted after provocation given by deceased, which provocation is deemed by law adequate to excite sudden and angry passions, this fact rebuts the presumption of malice, but the homicide is still unlawful, because a man is bound to curb his passions, and your verdict should accordingly be "manslaughter."

(Charged in substance. T. R. L., Judge.)

425 11.

The court instructs you that the true nature of manslaughter is that it is a homicide mitigated out of tenderness to the frailty of human nature. Every man when assailed with violence or great rudeness is inspired with a sudden impulse of anger, which puts him upon resistance before time for cool reflection; if during that period he attacks his assailant with a weapon likely to endanger life, and death ensues, it is regarded as done through heat of blood and violence of anger and not through malice. The same rule applies to a homicide in mutual combat which is attributed to sudden and violent

anger occasioned by the combat and not to malice. Where two meet, not intending to quarrel, and angry words suddenly arise and a conflict springs up in which blows are given on both sides, it is a mutual combat, without much regard to who is the assailant, and if not unfaur advantage be taken in the outset and an occasion is not sought for the purpose of gratifying malice, it is regarded as homicide in the heat of blood, and though not excusable, it is not murder, and your verdict should me "manslaughter" only.

(Charged in substance. T. R. L., Judge.)

12.

The court instructs the jury that where a voluntary homicide takes place under the influence of sudden passion, and no cause exists which will in law justify or excuse its commission, the true test to determine whether such homicide is manslaughter or murder in the second degree is, "Was there adequate cause to produce such passion?" If there was such adequate cause, the homicide will be manslaughter. If there was not such adequate cause, the homicide will be murder in the second degree. By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment,
or terror in a person of ordinary temper sufficient to render
426 the mind incapable of cool reflection. In order to reduce a
voluntary killing to the grade of manslaughter it is necessary not only that an adequate cause exist to produce the degree of anger, rage, resentment, or terror sufficient to render the mind incapable of cool reflection, but also that such state of mind did actually exist at the time of the commission of the offense.

"Kepm v. State, 13 Tex. App., 561."

(Charged. T. R. L., Judge.)

13.

The court instructs the jury that the provocation which will reduce a homicide from murder to manslaughter is something the natural tendency of which would be to disturb and obscure the reason to an extent which might render the average man of fair average mind and disposition liable to act rashly or without due deliberation or reflection, and from passion rather than judgment, and something which the jury are satisfied did so disturb and obscure the reason of the defendant in this case; that the homicide was the result of provocation and not of wilful and deliberate malice; and if the jury are satisfied, from all the evidence in this case, that the crime charged in the indictment was the result of provocation and not of wilful and deliberate malice, then you should find the defendant guilty of "manslaughter."

"State v. Hoyt, 10 Minn., 132."

(Charged in substance. T. R. L., Judge.)

427

14.

The court instructs the jury that it is not necessary that the reason should be entirely dethroned or overcome by passion, so as to destroy all intelligent volition, but merely that the exercise of judgment should be adequate provocation be impeded and disturbed by the violence of excitement.

"Maher vs. People, 10 Mich., 212."

(Charged in substance. T. R. L., Judge.)

15.

The court instructs the jury that a reasonable time within which the law presumes that the blood has cooled and the angry passion aroused by the provocation has subsided is the time within which an ordinary, reasonable man would cool under like circumstances. In applying this test all circumstances attending the homicide are to be taken into consideration, including the nature and extent of the provocation, the physical and mental condition of the defendant, his condition in life and peculiar situation at the time of the homicide, his education and habits, and his conduct, manner, and conversation throughout the altercation. In a word, all pertinent circumstances may be considered, and the time in which an ordinary man in like circumstances would have cooled is the reasonable time.

"State v. McCants, 1 Spear (S. C.), 384."

(Charged. T. R. L., Judge.)

428

16.

The court instructs the jury that where one is attacked by another in such a manner or under such circumstances as to produce on his mind reasonable grounds for apprehending a design to take his life or to do him some great bodily harm, and there is reasonable ground for believing the danger imminent and actual that such design will be accomplished, the defendant may safely act upon appearances and kill his assailant if he honestly believes and has reason to believe that the killing is necessary to avoid the apparent danger, and the killing will be justifiable, although it may turn out that there was in fact neither design to do him serious injury nor danger that it would be done; and if you believe, from the evidence, that the defendant had reasonable grounds for apprehending a design to take his life or to do him great bodily harm at the time of the commission of the crime charged in the indictment, your verdict should be "not guilty."

(Refused. T. R. L., Judge.)

17.

The court instructs you that men, when threatened with danger, must determine from the appearance and actual state of things surrounding them as to the necessity of resorting to force in self-

defense, and if they act from reasonable and honest convictions they will not be held responsible for a mistake in the extent of the actual danger.

" Campbell v. People, 16 Ill., 17."

(Refused. T. R. L., Judge.)

429 18.

The court instructs that danger which will justify a killing in self-defense need not be real, but only such as would lead a reasonably prudent man to believe in its reality; and in estimating the nature and imminence of the danger and in the choice of the means to avoid it or the amount of force to be used in repelling it, the excitement and confusion of the surrounding circumstances must be considered, and defendant is not to be held to the same cool and deliberate judgment in estimating the danger or the choice of means for repelling it as is possible to persons unaffected by excitement or danger in subsequently contemplating the situation.

" Patten v. People, 18 Mich., 314."

(Refused. T. R. L., Judge.)

19.

The jury are further instructed that in the trial of or examination upon all indictment, complaints, information, and other proceedings before any court, magistrate, jury, or other tribunal, against persons accused or charged with the commission of crimes or offenses, the person so charged or accused shall, at his own request, but not otherwise, be deemed a competent witness, the credit to be given to his testimony being left solely to the jury, under the instructions of the court; provided, that his waiver of such right shall not create any presumption against him.

(Charged in substance. T. R. L., Judge.)

(Endorsed:) #331. In the District Court for the District of Alaska. Div. No. 4. United States vs. George Matheson. Instructions requested by defendant. Filed in open court Sept. 11, 1909. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, clerk, by E. A. Henderson, deputy.

430 And be it further remembered that thereafter, and immediately upon the court concluding its charge to the jury, and before the jury retired to consider of their verdict, the defendant, by his counsel, in open court made and entered his exceptions to the charge of the court, as follows:

I.

The defendant excepts to the court's instruction numbered VIII, for the reason that the same is not based on any evidence or issue in this case, and it therefore tends to confuse the jury and detract their

attention from the real evidence and issues of the case, and that the same is against the evidence.

II.

The defendant excepts to the instruction of the court given to the jury upon the question of malice and the definition of malice, as contained in instruction numbered XIV, for the reason that such definition of malice is not in accordance with its legal meaning or intent, and excepts particularly to the following words: "And in a case of homicide the law presumes malice from the use of a deadly weapon, unless the evidence which proves the killing shows that it was perpetrated without malice," for the reason that it is not a fair statement of the law and restricts the meaning of the word malice and gives the jury liberty to imply malice where it may not exist.

The defendant further excepts to the language of said instruction, "And therefore, unless the evidence in this case shows that the alleged act was perpetrated without malice as defined in these instructions, you are justified in presuming malice from the use of such weapon," for the reason that such language is misleading and does not state the law, and is not law.

431

III.

The defendant excepts to instruction numbered XXXIII and to the whole thereof, for the reason that the same is misleading and is against the law, and tends to confuse the jury and mislead them, to the prejudice of the defendant.

IV.

The defendant excepts to the court's instruction numbered XXXIV, given to the jury, for the reason that the same tends to prejudice the jury against the rights of the defendant; that it invades the province of the jury and assumes certain facts therein enumerated as proven, and that, read as a whole, it is and has the practical effect of instructing the jury to find the defendant guilty; that such instruction does not state the law; and that the rules therein stated as law are against law.

V.

The defendant excepts to the instruction given to the jury by the court numbered XXXVI, for the reason that the same is not a fair or legal definition of the word "insanity" where the same is interposed as a defence, and that it does not state the law regarding and governing the defence of insanity, or define insanity within the meaning of the law as a defence.

VI.

The defendant excepts to the following language, as given to the jury and contained in instruction numbered XXXVII, as follows:

"The court instructs the jury that the nature, character, and degree of insanity which exonerates a party from criminal responsibility is not easily explained or understood," for the reason that such
432 language is misleading and tends to confuse the jury, and for the reason that the rules of law which describe the nature, character, and degree of insanity such as to exonerate a party from criminal responsibility are susceptible of full explanation and are easily understood.

VII.

The defendant also excepts to the following clause in said instruction numbered XXXVII, given by the court to the jury, "But if you believe from all the evidence and circumstances in the case that the defendant was in the possession of a rational intellect or sound mind, and from some real or fancied injury he allowed his passion to escape control, then, though passion or revenge may for the time have driven reason from its seat and usurped it and urged the defendant, he cannot claim for such acts the protection of insanity," for the reason that the same is contradictory of the definition of insanity contained in the other instructions of the court on the subject, and does not state the law, but is against law.

VIII.

The defendant excepts to all that part of instruction numbered XLI given by the court to the jury as contained in paragraph one thereof, for the reason that the same is misleading and does not state the law; and excepts to all that portion of said instruction numbered XLI contained in the last paragraph thereof, for the same reason.

IX.

The defendant excepts to the refusal of the court to give to the jury the instruction numbered 2 as the same appears in the requests of the defendant to instruct as filed herein, and to give the same in manner and form as so prepared and submitted by the defendant.

433 X.

The defendant excepts to the refusal of the court to give to the jury the instruction numbered 3 in manner as prepared and submitted by the defendant and on file herein.

XI.

The defendant excepts to the refusal of the court to give the whole of defendant's requested instruction No. 6 as prepared and requested by the defendant and on file herein, and particularly to the refusal of the court to give to the jury that portion of said requested instruction which the court omitted to give.

XII.

The defendant excepts to the refusal of the court to give in language and form as requested the defendant's requested instruction No. 8.

XIII.

The defendant excepts to the refusal of the court to give to the jury in language and form as requested the defendant's requested instruction No. 10.

XIV.

The defendant excepts to the refusal of the court to give in language and form as requested the defendant's requested instruction No. 11.

XV.

The defendant excepts to the refusal of the court to give to the jury in language and form as requested the defendant's requested instruction No. 13.

XVI.

The defendant excepts to the refusal of the court to give to the jury in language and form as requested the defendant's requested instruction No. 14.

434 XVII.

The defendant excepts to the refusal of the court to give in language and form as requested defendant's requested instruction No. 16.

XVIII.

The defendant excepts to the refusal of the court to give to the jury in manner and form as requested defendant's requested instruction No. 17.

XIX.

The defendant excepts to the refusal of the court to give to the jury in manner and form as requested the defendant's requested instruction No. 18.

XX.

The defendant further excepts to the instructions of the court given to the jury in this case, as a whole and each and every one and all thereof, for the reason that said instructions as a whole place undue emphasis upon the matters and things and the rules of law

under which the defendant might be found guilty, to the manifest prejudice of the substantial rights of the defendant before the jury and against a fair consideration of the testimony.

435 In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA
vs.
GEORGE MATHESON, DEFENDANT. } No. 331. Criminal.

Verdict.

We the jury, duly empaneled and sworn in the above entitled case, find the defendant George Matheson guilty of murder in the first degree as charged in the indictment, but "without capital punishment."

Fairbanks, Alaska, September 11th, 1909.

J. A. JESSON, *Foreman.*

(Endorsed:) #331. Criminal. In the District Court for the Territory of Alaska, Fourth Division. United States vs. George Matheson, defendant. Verdict. Filed in open court Sep. 11. 1909. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, clerk, by E. A. Henderson, deputy.

436 In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT. } No. 331.

Motion for new trial.

Comes now the defendant in the above entitled action, and moves the court to set aside the verdict of the jury to the above entitled cause, upon the following grounds, to wit:

I.

Errors of the law occuring at the trial of this cause and excepted to by the defendant, to wit:

A. That the court erred in refusing to allow the witness, Robert Matheson, father of the defendant, to testify as to the insanity of two of the sisters of the defendant, or to state his opinion as to their sanity or insanity; also as to the insanity of the near relatives of the defendant, to wit, an aunt of his father's and a half sister and cousin of his mother's.

B. That the court erred in excluding the testimony and evidence, and refusing to allow the witness, Mrs. Robert Matheson, the mother of the defendant, to and of the insanity of two of the sisters of the defendant; also of her own half sister, and her cousin, or to express an opinion as to the sanity or insanity of the said sisters of the defendant, her own half-sister and cousin.

C. That the court erred in refusing to allow the witness,
437 Mrs. Rathenberg, to testify as to her opinion of the defendant's sanity or insanity during the whole or any part of the period of her acquaintance with the defendant, being a period of about eight years next preceding the crime charges in the indictment on file in this cause.

D. That the court erred in refusing to allow the witness McDowell to testify as to his opinion of the defendant's sanity or insanity during his acquaintance with him, being a period of one year, more or less, preceding the commission of the act charged in the indictment.

E. That the court erred in using language which tended to prejudice the jury against the defendant, and the defense of the insanity of the defendant, in his rulings upon the objections and questions of counsel for defendant during the progress of the trial, which language was excepted to, at the time of its use, by the defendant.

F. That the court erred in refusing to direct the jury, at the close of the case for the prosecution, to return a verdict of not guilty, based upon the grounds that there was not sufficient evidence to support a verdict of guilty of the crime charged in the indictment, or of any crime necessarily included within it.

G. That the court erred in instructing the jury upon the question of "oral admissions," as the same appear in instruction No. 8 of the court's instructions to the jury herein, for the reason that there was no evidence or oral admissions offered at the trial herein, and that the same is contrary to the law and the evidence.

H. That the court erred in his instructions to the jury in giving instruction No. 10, because the same was not warranted by the evidence in this case which was offered, and because there is no evidence or intimation that there was other or better evidence within the power of the defendant to produce, which he did not produce, and because such instruction is not based upon any reasonable
438 hypothesis growing out of the evidence introduced in this cause.

I. That the court erred in his definition of "malice," as contained in instruction No. 14, given to the jury herein, because such definition, so given, is not a legal definition of the term "malice" as used in the criminal code, and is against the law, and particularly to the following language: "And in case of homicide the law presumes malice from the use of a deadly weapon, unless the evidence which proves the killing shows that it was not premeditated," because such language does not fairly state the law upon that point. And also especially to the following language used in said instruction: "There-

fore, unless the evidence in this case shall show that the alleged act of the defendant was perpetrated without malice, as defined in these instructions, you are justified in presuming malice from the use of such weapon," because such language does not fairly state the law on that question and invades the province of the jury in assuming a fact which it is necessary to prove in this case before the defendant could be found guilty, which fact must be found by the jury.

J. That the court erred in giving instruction No. 16 to the jury, because the same is against the law, and because it does not direct the jury that they can find the defendant guilty only after a consideration of all the evidence in the case and believe him guilty beyond a reasonable doubt.

K. That the court erred in giving the first paragraph of instruction No. 17 to the jury, for the reason that the same is against the law.

L. That the court erred in giving to the jury instruction No. 18, because the same is against the law, and is not based upon any evidence in this case.

M. That the court erred in giving instruction No. 26 to the jury, for the reason that the same is a repetition of instructions
439 already given and unduly emphasizes the instructions in favor of the prosecution and tends to prejudice the jury against the defendant.

N. That the court erred in giving instruction No. 33 (33) to the jury, for the reason that said instruction is not the law and is against the law, and tends to prejudice the jury against the defendant, and amounts to a direction to the jury to find the defendant guilty as charged in the indictment, and for the further reason that said instruction invades the province of the jury and assumes as proved beyond a reasonable doubt the fact necessary to a conviction of the defendant.

O. That the court erred in giving instruction No. 33 to the jury, for the reason that said instruction is not the law and is against the law, and tends to prejudice the jury against the defendant, and amounts to a direction to the jury to find the defendant guilty as charged in the indictment, and for the further reason that said instruction invades the province of the jury and assumes as proved beyond a reasonable doubt the facts necessary to a conviction of the defendant.

P. That the court erred in giving to the jury instruction No. 36, because the same does not clearly state the law and is against the law and is not a legal definition of "insanity" where interposed as a defense to a charge of homicide.

Q. That the court erred in charging the jury in the first paragraph of instruction No. 37, as follows: "The court instructs the jury that the nature, character, and degree of the insanity which exonerates a party from criminal responsibility is not easily understood," for the reason that it is not a correct statement of the law upon that subject and is against the law, and tends to mislead and confuse the jury.

R. That the court erred in instructing the jury in the language contained in the 3rd paragraph of instruction 37, as follows: "But if you believe from all the evidence and circumstances in the case that the defendant was in the possession of a rational intellect or a sound mind and from some real or fancied injury he allowed
440 his passion to escape control, then, though passion or revenge may for the time have driven reason from i's seat and usurped it and urged the defendant, he cannot claim for such acts the protection of insanity," for the reason that the same is against the law.

S. That the court erred in instructing the jury in the following language as contained in instruction No. 40, being the last paragraph of said instruction: "You are instructed that, within the legal definition of insanity, the defendant was responsible for his acts if at the time of the commission of the crime he was of sufficient mental capacity to understand its nature and quality, and that the particular act in question was wrong and in violation of the law of the land for which he would be amenable to punishment under that law. And if you find from all the evidence in the case, beyond a reasonable doubt, that he was of such mental capacity, then and in that case you should not acquit him on the ground of insanity," for the reason that such instruction is against the law and does not state the law applicable to such defense.

T. That the court erred in giving to the jury the instruction contained in the first paragraph of instruction No. 51, and also the instruction contained in the last paragraph of said instruction No. 51, for the reason that said paragraphs are against the law.

441 U. That the instructions of the court, as a whole, tend to prejudice the jury against the defendant, and state the law more fully and more emphatically in favor of the prosecution than in favor of the defendant. That they are involved, contradictory, and confusing, and tend to confuse and mislead the jury.

V. That the court erred in refusing to give the whole of instruction No. 2 requested by the defendant, in the language as prepared and requested by the defendant, because the same fully and fairly states the law, and because the defendant is entitled to have the said instruction given to the jury in this case as so prepared and requested. And that where the same purports to have been charged, in substance, by the court, such charge is confused, does not state the law fully or fairly, and is misleading.

W. That the court erred in refusing to give defendant's requested instruction No. 3, because said instruction states the law fully and fairly, and that because the instructions given to the jury, do not contain in substance, or at all, the law stated in said instruction No. 3.

X. That the court erred in refusing to give defendant's requested instruction No. 6, and the whole thereof, in the manner and form as requested by the defendant, because the said instruction fully and fairly states the law, and the whole of the law, upon the question sought to be placed before the jury, and because the jury were entitled to the whole and not part of the said law.

II.

That the verdict in this case should be set aside and a new trial granted, for the the following reasons, to wit:

a. Because the jury was not empanelled according to law, and had no jurisdiction or authority to hear the evidence or try the issues herein.

b. Because the verdict is against the law.

c. Because the verdict is against, and is not supported by the evidence and proofs adduced herein.

442 d. Because the court has not been called and convened in the manner provided by law.

e. Because the court has nor jurisdiction of the person of the defendant.

f. Because the court has no jurisdiction of the offense charged in the indictment herein.

III.

a. For the reason that the court is not convened in regular term in the manner provided by law, because the alleged or pretended notice of the convening of this court, in regular term, was not issued by a judge of this court, or any judge having any authority to issue such call, and because such call was issued before this court had any existence, either in law or fact, as will appear by the records and files of this court.

b. For the reason that the alleged or pretended notice and order for the calling of the petit jury in attendance upon the court at this time, the regular panel thereof from which panel a portion of the jury selected to try this case, was made up, was not issued in the manner provided by law, or by the judge of this court, or any judge who had authority to issue such notice and order, and because such notice and order was issued prior to and at a time when this court had no existence in law or in fact, as will appear by the files and records of this court.

JOHN F. DILLON,
Attorney for defendant.

Due and legal service of a true copy of the within motion for a new trial is hereby accepted this 13th day of September, 1909.

JAMES J. CROSSLEY,
U. S. Attorney.

By CECIL CLEGG,
Assistant U. S. Atty.

443 (Endorsed:) No. 331. Criminal. District Court, 4th Division, Territory of Alaska. United States vs. George Matheson. Motion for new trial. Filed in open court Sep. 13, 1909. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, clerk, by E. A. Henderson, deputy. John F. Dillon, attorney for defendant.

444 In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA
vs.
GEORGE MATHESON.
No. 331.

Order overruling motion for new trial.

Now, on this 17th day of September, 1909, the above-entitled cause came on to be heard on defendant's motion for a new trial, then being present in open court defendant, George Matheson, and his counsel, John F. Dillon, and James J. Crossley, United States district attorney, counsel for the United States. Argument of counsel was heard at length and citations noted, after which the court, being well advised, it is ordered, that defendant's motion for a new trial be, and the same is now hereby, overruled.

THOMAS R. LYONS, *District Judge.*

(Court journal No. 9, page 388.)

445 In the District Court for the Territory of Alaska, Fourth Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT.
No. 331.

I, Thomas R. Lyons, presiding judge of the District Court for the Territory of Alaska, Fourth Division, do hereby certify that the above and foregoing contains a full, true, and correct transcript of all the evidence introduced at the trial of the said cause of the United States of America, plaintiff, against George Matheson, defendant, and correct copies of the instructions to the jury, requested instructions to the jury, verdict, motion for a new trial, and order overruling the same, and I do hereby allow, sign, and seal this as and for a true bill of exceptions and order the same to be filed as part of the record.

In testimony whereof I have hereunto set my hand and seal, this the 9th day of July, A. D. one thousand nine hundred ten.

THOMAS R. LYONS, *Judge.*

446 (Endorsements:) No. 331. Crim. In the District Court for the Territory of Alaska, 4th Div'n. The United States of America, plaintiff, vs. George Matheson, defendant. Bill of exceptions. Filed in the District Court, Territory of Alaska, 4th Div., Jul. 12, 1910. C. C. Page, clerk, by E. A. Henderson, deputy.

447 Be it remembered that, at the general July, 1909, term of the District Court for the Territory of Alaska, Fourth Division,

held in the court room in Fairbanks, in said division and Territory, on the eleventh day of September, A. D. one thousand nine hundred nine, present the honorable Thomas R. Lyons, presiding judge of said court; James J. Crossley, United States district attorney; H. K. Love, United States marshal; and E. H. Mack, clerk of said court, by E. A. Henderson, deputy clerk, the following proceedings were had and done, inter alia, to wit:

In the District Court for the Territory of Alaska, Fourth Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT. } No. 331. Criminal.

Judgment and sentence.

And now, to wit, this twenty-first day of September, A. D. one thousand nine hundred nine, the plaintiff appearing by James J. Crossley, United States district attorney for the Territory of Alaska, Fourth Division, and the defendant being present in open court in person and appearing by John F. Dillon, his attorney, and the court having heretofore fixed this as the time to pass sentence and pronounce judgment in this action, and it appearing to the court that heretofore, upon a full trial before the court and a jury, the defendant, George Matheson, was, on the eleventh day of September, A. D. one thousand nine hundred nine, found guilty of murder in the first degree, as charged in the indictment herein, but without capital punishment, in having, on the twenty-fourth day of May,
A. D. one thousand nine hundred eight, at Chicken Creek,
448 in the Third (now Fourth) Division of the Territory of
Alaska, and within the jurisdiction of this court, being then of sound memory and discretion, unlawfully, feloniously, purposely, and of deliberate and premeditated malice, killed on Gus Lawless by then and there shooting him, the said Gus Lawless, with a loaded revolver or pistol, whereby he died on the twenty-fourth day of May, A. D. one thousand nine hundred eight; and now, the defendant being brought to the bar of the court and it now being inquired of him whether he had anything to say why sentence should not now be passed upon him, says nothing, except as he before has said, wherefore, by reason of the law and the premises,

It is now ordered, adjudged, and decreed, and the court doth hereby order, adjudge, and decree that the defendant, George Matheson, is now guilty of murder in the first degree, in conformity with the verdict of said jury, and that he, now being present before the court, is here now sentenced to imprisonment at hard labor for the term of his natural life from and after the date hereof, in the United States penitentiary on McNeils Island, in Pierce County, in the State of Washington, and that the United States marshal for

the Territory of Alaska, Fourth Division, is hereby ordered to convey him forthwith to said prison and there deliver him in accordance with law, and this shall be his warrant therefor.

Done in open court at Fairbanks, Alaska, on this twenty-first day of September, A. D. one thousand nine hundred nine.

THOMAS R. LYONS, *District Judge.*

(Endorsed:) Entered court journal No. 9, page 402.

449 In the District Court for the Territory of Alaska, Fourth Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT. } No. 331. Crim.

Assignment of errors.

The defendant respectfully shows that, at the trial of said cause in the said court at Fairbanks, Alaska, commencing on the seventh day of September, A. D. one thousand nine hundred nine, errors affecting his substantial rights appear in the record and proceedings thereof in the following matters, to wit:

1.

That the court erred in overruling the objections of the defendant to the selecting of a jury to try this cause from the then present jury, upon the ground that the judge who issued the call was without jurisdiction to issue the same and was not a judicial officer, and that the court now trying the cause had no legal existence at the time of issuance of said call.

(See Record, pages 1 and 2.)

2.

That the court erred in excluding the evidence of the witness, Robert Matheson, the father of the defendant, as to the blood relationship existing between himself and his wife, the mother of the defendant.

(See Record, page 262.)

3.

That the court erred in refusing to allow the defendant to prove by the said witness, Robert Matheson, and others that insanity
450 exists and is inherited in the family; that a number of the ancestors of the defendant have been insane; that some of defendant's relatives, his brothers and sisters, were then insane; and that the defendant has been insane both before and since the occur-

rence of the act charged and at the time of the commission of the act; to which ruling of the court defendant duly excepted, and said exception was allowed.

(See Record, pages 263 and 264.)

4.

That court erred in the language used, in the presence of the jury, in overruling the offer of the defendant to prove the insanity of the sisters of the defendant, by their father, in that said language tended to prejudice the minds of the jury against the defense of insanity; to which ruling the defendant duly excepted, and said exception was allowed.

(See Record, pages 264 and 265.)

5.

That the court erred in sustaining the objection of the plaintiff to the following question asked the witness, Robert Matheson, the father of the defendant: "Is either of them (the sisters of the defendant) suffering from any disease at the present time?" To which ruling the defendant duly excepted, and said exception was allowed.

(See Record, page 267.)

6.

That the court erred in refusing to allow the defendant to prove by the said witness, Robert Matheson, that one of defendant's sisters is suffering, and has for many years been suffering, from epileptic fits, which are an evidence of insanity; to which ruling the defendant duly excepted, and said exception was allowed.

(See Record, page 267.)

7.

That the court erred in sustaining the objection of the
451 plaintiff to the following question asked the witness, Robert Matheson, the father of the defendant: "Did he take any interest in the affairs of life or in his own affairs?" and erred in the form of the language used in the presence of the jury in overruling said question in that the same tended to prejudice the minds of the jury against the defense of insanity of the defendant; to which ruling the defendant duly excepted, and said exception was allowed.

(See Record, pages 271 and 272.)

8.

That the court erred in refusing to permit the defendant to prove by the witness, Robert Matheson, the father of the defendant, that an aunt of his was insane; to which ruling the defendant duly excepted, and said exception was allowed.

(See Record, pages 290 and 291.)

9.

That the court erred in refusing to allow the said witness, Robert Matheson, to answer the following question: "Tell the jury about the girl (defendant's sister) having fits, how often she has them, and when they first commenced;" to which ruling the defendant duly excepted, and said exception was allowed.

(See Record, pages 290 and 291.)

10.

That the court erred in the language used by him in the presence of the jury in reply to an objection of the defendant to the interruption by the district attorney of the witness while giving his answer, in the use of the following language: "The district attorney is trying to get facts before the jury instead of conclusions, and so is the court;" to which language the defendant duly excepted, and said exception was allowed.

(See Record, page 302.)

11.

That the court erred in overruling the following question asked the witness, Macdonald, a witness on behalf of the
452 defendant: "And then, from the general conduct and from the things that you have related, what is your opinion as to his being sane or insane?" to which ruling the defendant duly excepted, and said exception was allowed.

(See Record, page 304.)

12.

That the court erred in sustaining the objection to the following question asked the witness Furlong, a witness in behalf of the defendant, "From the conversations you had with George Metheson on Chicken Creek on this occasion and his demeanor toward you did you form an opinion as to whether or not he was sane or insane part or all of the time?" to which ruling the defendant duly excepted and said exception was allowed.

(See Record, page 322.)

13.

That the court erred in overruling the objection of the defendant to the following question, asked the witness Mack, a witness offered on behalf of the plaintiff in rebuttal, "Will you state to the jury whether or not, from your observation and acquaintance with the defendant, he was sane or insane at the time just previous to the offense on the twenty-fourth day of May, 1908, Mr. Mack?" to which ruling the defendant duly excepted and said exception was allowed.

(See Record, page 351.)

14.

That the court erred in overruling the objection of the defendant to the following question asked the witness Mack by plaintiff, "You would not say he was insane, would you, Mr. Mack?" upon the ground that the same was leading and suggestive, to which ruling the defendant duly excepted and said exception was allowed.

(See Record, page 352.)

453

15.

That the court erred in overruling the objection of the defendant to the following question asked the witness Lake, a witness offered by the plaintiff in rebuttal, "You may state, Mr. Lake, whether, in your opinion, from your observation of the defendant and his actions, he was sane or insane at that time," to which the defendant objected unless it was confined to the time the observations were made, to which ruling of the court the defendant duly objected and said objection was allowed.

(See Record, page 354.)

16.

That the court erred in overruling the objection of the defendant to the following question asked the witness Taylor, a witness offered by the defendant in rebuttal, "From your observation of his actions will you state to the jury whether or not, in your opinion, he was sane or insane," said objection being based on the ground that no the jury in this cause, to which instruction the defendan*d* duly excepted and said exception was allowed.

(See Record, page 558.)

17.

That the court erred in its instruction numbered eight, given to the jury in this cause, to which instruction the defendan*d* duly excepted and said exception was allowed.

18.

That the court erred in its instruction upon the question of malice and the definition of malice, as contained in its instruction numbered four, as given to the jury in this cause, and especially in the following language contained in said instruction, "In a case of homicide the law presumes malice from the use of a deadly weapon, unless the evidence which proves the killing shows that it was per-
454 petrated without malice," to which exception defendant duly excepted and said exception was allowed.

19.

That the court erred in its instruction numbered thirty-three, given to the jury in this cause, to which instruction the defendant duly excepted and said exception was allowed.

20.

That the court erred in its instruction numbered thirty-four, given to the jury in this cause, to which instruction the defendant duly excepted and said exception was allowed.

21.

That the court erred in its instruction numbered thirty-six, given to the jury in this cause, upon the definition of insanity, to which instruction the defendant duly excepted and said exception was allowed.

22.

That the court erred in the language used in its instruction numbered thirty-seven, given to the jury in this cause, as follows, "The court instructs the jury that the nature, character, and degree of insanity which exonerates a party from criminal responsibility is not easily explained or understood," to which instruction the defendant duly excepted and said exception was allowed.

23.

That the court erred in the use of the following language, contained in its instruction numbered thirty-seven, given to the jury in this case, "But if you believe from all the evidence and circumstances in the case that the defendant was in the possession of a rational intellect and sound mind and from real or fancied injury he allowed his passion to escape control, then, though for a time passion may have driven reason from its seat and usurped it, he can not claim for such cause the protection of insanity," to which instruction the
455 defendant duly excepted and said exception was allowed.

24.

That the court erred in giving to the jury in this cause all that part of instruction numbered forty-one contained in paragraph one thereof, to which instruction the defendant duly excepted and said exception was allowed.

25.

That the court erred in refusing to give to the jury in this cause the instruction numbered two as it appears in the defendant's requested instructions filed in this cause, to which refusal defendant duly excepted and his exception was allowed.

26.

That the court erred in refusing to give to the jury in this cause the instruction numbered three as it appears in the defendant's requested

instructions filed in this cause, to which refusal defendant duly excepted and his exception was allowed.

27.

That the court erred in refusing to give to the jury the whole of the instruction numbered six as it appears in the defendant's requested instructions in this cause, and particularly in refusing to give to the jury that part of said requested instruction which the court omitted to give, to which refusal the defendant duly excepted and said exception was allowed.

28.

That the court erred in refusing to give in the language and form requested defendants requested instruction numbered eight, as it appears in defendant's requested instructions on file herein, to which refusal the defendant duly excepted and said exception was allowed.

456

29.

That the court erred in refusing to give to the jury, in the language and form requested, defendant's requested instruction numbered ten, as it appears in defendant's requested instructions on file in this cause, to which refusal the defendant duly excepted, and said exception was allowed.

30.

That the court erred in its refusal to give to the jury in the language and form requested, the defendant's requested instruction numbered eleven, as the same appears in defendant's requested instructions filed in this cause, to which refusal of the court defendant duly excepted, and said exception was allowed.

31.

That the court erred in its refusal to give to the jury, in the language and form requested, defendant's requested instruction numbered thirteen, as the same appears in defendant's requested instructions on file in this cause, to which refusal the defendant duly excepted, and said exception was allowed.

32.

That the court erred in refusing to give to the jury, in the language and form requested, defendant's requested instruction numbered fourteen, as the same appears in defendant's requested instructions on file in this cause, to which refusal the defendant duly excepted, and said exception was allowed.

33.

That the court erred in refusing to give to the jury, in the language and form requested, defendant's requested instruction numbered sixteen, as the same appears in defendant's requested instructions on file in this cause, to which refusal the defendant duly excepted, and said exception was allowed.

457 34.

That the court erred in refusing to give to the jury, in the language and form requested, the defendant's requested instruction numbered seventeen, as the same appears in the defendant's requested instructions on file in this cause, to which refusal the defendant duly excepted, and said exception was allowed.

35.

That the court erred in refusing to give to the jury, in the language and form requested, the defendant's requested instruction numbered eighteen, as the same appears in the defendant's requested excepted, and said exception was allowed.

36.

That the court erred in its instructions to the jury as a whole as given in this cause, in each and every and all thereof, for the reason that the said instructions taken as a whole place undue emphasis upon matters and things and rulings of law under which the defendant may be found guilty, to the manifest prejudice to the substantial rights of said defendant before the jury and against a fair consideration of the testimony, to which instructions as a whole the defendant duly excepted, and said exception was allowed.

37.

That the court erred in overruling defendant's motion for a new trial, to which ruling defendant duly excepted, and said exception was allowed.

JOHN F. DILLON,
Attorney for Defendant.

458 (Endorsements:) No. 331. In the District Court for the Territory of Alaska, 4 Div'n. The United States of America, plaintiff, vs. George Matheson, defendant. Assignment of errors. Filed in open court Jul. 9, 1910. Dist. Court Ter. Alaska, 4th Div. C. C. Page, clerk, by E. A. Henderson, deputy.

459 In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT. } No. 331. Criminal.

Petition.

Comes now the defendant in the above-entitled action and respectfully represents to the court as follows:

I.

That he has been, upon trial of this cause, convicted of the crime of murder in the first degree.

II.

That numerous errors occurred at the trial thereof, which he believes 'revented him from having a fair and impartial trial and entitled him to a new trial.

III.

That he has filed his motion for a new trial herein in accordance with the requirements of law and the rules of practice of this court, which said motions have been disallowed and overruled.

IV.

That he intends appealing from the judgment herein to the Supreme Court of the Unites States, and that to enable him to properly prepare his record on appeal a transcript of all the papers and of the evidence and the exceptions taken in the case and at the trial is necessary.

V.

That he is wholly without means to pay for a transcript of such papers, evidence, and exceptions or with which to pay his attorneys for their services in this case.

460 Wherefore he prays this honorable court that an order be entered directing the official stenographer of this court to furnish such transcript without cost to this defendant.

JOHN F. DILLON,
Attorney for Defendant.

Service of copy of foregoing accepted this 5th day of Nov., 1909.
JAMES J. CROSSLEY, *U. S. Atty.*

(Endorsed:) # 331. In the District Court for Territory of Alaska, Fourth Division. United States, pl., vs. Geo. Matheson, def. Petition for official transcript free of cost. Filed in open court Nov. 5, 1909. Dist. Court Ter. Alas., 4th Div. E. H. Mack, clerk, by E. A. Henderson, deputy.

461 In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT. } No. 331.

Affidavit for prosecution of writ of error in forma pauperis.

UNITED STATES OF AMERICA,
Territory of Alaska, Fairbanks Precinct, ss:

GEORGE MATHESON, of Fairbanks, Alaska, being first duly sworn, makes oath and says:

That he is the defendant above named and intends filing his petition for a writ of error to the Supreme Court of the United States, feeling himself aggrieved by the verdict of the jury and the judgment entered in the above cause in said District Court;

The deponent believes that he is entitled to the redress sought to be obtained by his suit in error, and has good grounds for his said appeal to the United States Circuit Court of Appeals aforesaid.

That by reason of his poverty this deponent is unable to pay or secure the costs of prosecuting his said suit in error, and this deponent therefore prays that he may have leave to prosecute said suit in forma pauperis, pursuant to the statute in that case made and provided.

G. E. MATHESON.

Subscribed and sworn to before me this 6 day of Oct., 1909.
[SEAL.] JOHN F. DILLON,
A Notary Public in and for Alaska.

Service accepted this 5th day of Nov., 1909.
JAMES J. CROSSLEY,
U. S. Attorney.

462 (Endorsed:) #331. In the District Court for the Territory of Alaska, Fourth Division. United States of America, pl., vs. Geo. Matheson, def. Affidavit informa pauperis on appeal. Filed in open court Nov. 5, 1909. Dist. Court Ter. Alaska, 4th Div. E. H. Mack, clerk, by E. A. Henderson, deputy.

463 In the District Court for the Territory of Alaska, Fourth Judicial Division.

In the matter of application of George Matheson to prosecute writ of error from the judgment and sentence of this court to the Supreme Court of the United States in forma pauperis.

Opinion overruling former opinion.

LYONS, District Judge (orally):

Here two or three weeks ago there was an application made by George Matheson, who was convicted during this term of court of the crime of murder in the first degree and sentenced to life imprisonment, the jury having qualified their verdict to that extent. Afterwards there was a motion made by the defendant to be permitted to prosecute a writ of error to the Supreme Court of the United States in forma pauperis. The application was denied at that time, the court following the cases of Bradford v. Southern Railway Company, a late case from the Supreme Court of the United States, and also the case of Bristol v. United States in the 129th Federal Reporter, a case from the Seventh Circuit.

Since that time counsel for the defendant has called the court's attention to the case of the United States v. Fitzpatrick, a case that was tried in this district before any division was made, there being only one division for the entire district, and a writ of error was prosecuted from the judgment and sentence in that case, which was the same as the judgment in this case, to the Supreme Court of the United States, and the trial judge permitted the defendant to prosecute the writ in forma pauperis. The matter was not commented upon by the Supreme Court, the only question raised there being that of jurisdiction, the contention by the Attorney General being
464 that the case should have gone directly to the Circuit Court of Appeals for the Ninth Circuit under the law of 1897 which allowed only capital criminal cases to go direct to the Supreme Court of the United States. But the Supreme Court held in that case that the offence was nevertheless capital, even though the penalty was not death, the verdict being for murder in the first degree, and the jury qualifying the verdict to murder in the first degree "without capital punishment," did not affect the question of the crime being a capital one, and for that reason the Supreme Court of the United States had jurisdiction. Another case went up the following year from one of the Dakotahs in which the Supreme Court reaffirmed the rule of the Fitzpatrick case.

There was no comment made in the Fitzpatrick case as to whether or not it should have been or could be prosecuted in forma pauperis. When I ruled on the matter before, I followed as closely as I could the statute under which the petitioner applied to prosecute the writ in forma pauperis. The statute is as follows:

"That hereafter in all cases of conviction the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall upon

the application of the respondent be reexamined, reversed, or affirmed by the Supreme Court of the United States, under such rules and regulations as such courts shall prescribe."

The statute further provides that the writ shall be allowed to the applicant as a matter of right, and without the requirement of any security for the prosecution of the same or for costs. In construing that statute before, I read the statute to only give the petitioner that right when the punishment was death from the crime charged—not what the punishment might have been under the law, but that the punishment inflicted should actually be death; and I am
465 not entirely convinced but what that is the proper construction of the statute yet. But it seems this court has heretofore allowed the prosecution of a writ in forma pauperis to the Supreme Court, Fitzpatrick vs. United States, supra, and while it made no comment on that feature of the matter and the Attorney General raised no question in reference thereto, I feel at this time disposed to reverse the order heretofore made by myself, and allow the prosecution of the writ in this case in forma pauperis. It may not enable counsel to get a ruling on the matter if I should grant the writ; yet I think if the matter were called to the attention of the Attorney General and the Supreme Court also, that there might be some suggestion made as to the propriety of the practice and as to whether or not this court has placed the proper construction on the statute. And for that reason I think—particularly since this court has heretofore allowed such a writ to be prosecuted and the appellate court didn't seem to criticise the ruling and the Attorney General took no exception to it—it seems to me the court should follow the precedent. For that reason the order heretofore made denying the petition will be set aside and the plaintiff in error allowed to prosecute his writ in forma pauperis.

Fairbanks, Alaska, February 14, 1910.

(Signed) THOMAS R. LYONS,
District Judge.

L. R. GILLETTE (O. K.), *Official Reporter.*

(Endorsed:) 331 Cr. In the District Court for the District of Alaska, Div. No. 4. United States vs. Geo. Matheson. Oral opinion reversing former opinion herein and setting aside former order herein. Dist. Court, Ter. Alaska, 4th Div. Filed in open court, Feb. 14, 1910. E. H. Mack, clerk, by E. A. Henderson, deputy.

466 In the District Court for the Territory of Alaska, Fourth Division.

THE UNITED STATES OF AMERICA
vs.
GEORGE MATHESON. } No. 331. Cr.

Order allowing appeal in forma pauperis.

Now, on this 14th day of February, 1910, the court reads and files an opinion in the above-entitled cause, at the conclusion of which it is

ordered that the ruling heretofore made denying the application for permission to prosecute an appeal to the Supreme Court of the United States in forma pauperis in the above-entitled cause be set aside and held for naught, and that said application be and the same is now hereby granted, to which ruling the Government excepts and the exception is allowed.

THOMAS R. LYONS, *District Judge.*

(Endorsed:) Entered in court journal No. 9, page 742. Dated Monday, February 14, 1910.

467 In the District Court for the Territory of Alaska, Fourth Division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT. } No. 331.

Petition for writ of error in forma pauperis and supersedeas.

George Matheson, defendant in the above-entitled cause, feeling himself aggrieved by the verdict of the jury and the judgment entered on the 21 day of Sept., 1909, comes now, by John F. Dillon, his attorney, and petitions said court for an order allowing said defendant to prosecute a writ of error to the honorable the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided that defendant be allowed to perfect this appeal without filing a bond as required by law, and without costs and fees of the cl'rk or other officer of this court upo' his affidavit made and filed in this cause, according to law; that all former proceedings in this court be suspended and stayed until the determination of said writ of error by the said Supreme Court.

Your petitioner respectfully states that he intended filing his assignment of errors committed by the court in said cause and intended to be urged by your petitioner and plaintiff in error in the prosecution of this his suit in error.

Dated Oct. 6, 1909.

JOHN F. DILLON,
Attorney for Defendant herein.

Service of copy of foregoing accepted this 5th day of Nov., 1909.

JAMES J. CROSSLEY,
U. S. Atty.

(Endorsements:) No. 331. In the District Court for Territory of Alaska, Fourth Division. United States vs. Geo. Matheson. Petition for writ in forma pauperis and supersedeas. Filed
468 in open court Nov. 5, 1909. Dist. Court, Ter. Alaska, 4th Div. E. H. Mack, clerk, by E. A. Henderson, deputy.

469 In the District Court for the Territory of Alaska, 4 Division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
GEORGE MATHESON, DEFENDANT. } No. 331. Cr.

Order allowing writ of error.

Now, on this 8th day of July, 1910, upon reading the petition and affidavit of the defendant herein, it is now ordered that a writ of error in the above-entitled cause issue, as prayed for in said petition, without costs or fees to the clerk or other officer of said court, and without filing the necessary bonds on appeal.

THOMAS A. LYONS,
Judge of the District Court for the Territory of Alaska, Fourth Division.

Entered in court journal No. 10, page 144.

469½ (Indorsed:) Original. No. 331. Criminal. In the District Court for the Territory of Alaska, 4th Div. The United States of America, plaintiff, vs. George Matheson, defendant. Order allowing writ of error. Filed in open court July 8, 1910. Dist. Court, Ter. Alaska, 4th Div. C. C. Page, clerk; by E. A. Henderson, deputy.

470 In the Supreme Court of the United States.

GEORGE MATHESON, PLAINTIFF IN ERROR & APPELLANT,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT IN error & respondent. } No. 331. Cr.

Writ of error.

UNITED STATES OF AMERICA, *s:*

The President of the United States of America to the Judge of the District Court for the Territory of Alaska, Fourth Division, greeting:

Because in the record and proceeding, and also in the rendition of the judgment of a plea which is in the said District Court before you, between the United States of America, plaintiff, and George Matheson, defendant, a manifest error hath happened, to the great damage of the said George Matheson, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, then under your seal, directly and openly, you send the record and proceedings aforesaid, and all things concerning the same, to the Justices of the Supreme Court of the United States, at the court-rooms of the said court in the city of Washington, District of Columbia, together with this writ, so that you have the same at the said place before the justices aforesaid on the 10 day of Oct. A. D. one thousand nine hundred ten, that the record and proceedings afore-

said being inspected, said justices of the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

471 Witness the Honorable John M. Harlan, Acting Chief Justice of the Supreme Court of the United States, this 9th day of July, in the year of our Lord one thousand nine hundred ten, and of the independence of the United States the one hundred and thirty-fifth.

[SEAL.]

C. C. PAGE,
Clerk of the District Court for the Territory of Alaska, Fourth Division.
By E. A. HENDERSON, *Deputy.*

The above writ of error is hereby allowed.

THOMAS A. LYONS,
Presiding Judge of the District Court for the Territory of Alaska, Fourth Division.

(Indorsed:) Original. No. 333. Cr. In the Supreme Court of the United States. George Matheson, plaintiff in error and appellant, vs. The United States of America, defendant in error and respondent. Writ of error. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 9, 1910. C. C. Page, clerk, by E. A. Henderson, deputy.

472 In the Supreme Court of the United States.

GEORGE MATHESON, PLAINTIFF IN ERROR AND appellant,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error and respondent.
No. 331.

Citation.

UNITED STATES OF AMERICA, *s:*

The President of the United States of America to the District Attorney for the Territory of Alaska, Fourth Division, greeting:

You are hereby cited and admonished, on behalf of the defendant in error, to be and appear at a term of the United States Supreme Court, to be held in the city of Washington, District of Columbia, on the 10 day of Oct., A. D. one thousand nine hundred ten, pursuant to a writ of error filed in the office of the clerk of the District Court for the Territory of Alaska, Fourth Division, wherein George Matheson is plaintiff in error and appellant and the United States of America is defendant in error and respondent, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the plaintiff in error in that behalf.

Witness the Honorable John M. Harlan, Acting Chief Justice of the Supreme Court of the United States, this 9th day of July, in the

year of our Lord one thousand nine hundred ten, and of the independence of the United States the one hundred thirty fifth.

[SEAL.] THOMAS R. LYONS,
Judge of the District Court
for the Territory of Alaska, Fourth Division.

Attest:
C. C. PAGE,
Clerk of the District Court
for the Territory of Alaska, 4th Division.

Service accepted.

JAMES J. CROSSLEY, *U. S. Att'y.*
By JOHN K. BROWN, *Ass't.*

(Indorsed:) Original. No. 331. Cr. In the Supreme Court of the United States. George Matheson, plaintiff in error and appellant, vs. The United States of America, defendant in error and respondent. Citation. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 9, 1910. C. C. Page, clerk, by E. A. Henderson, deputy.

474 District Court for the Territory Alaska, Division Four, at Fairbanks.

UNITED STATES
vs.
GEO. MATHESON. } No. 331.

Clerk's certificate to transcript to record.

UNITED STATES OF AMERICA, *District of Alaska, ss:*

I, C. C. Page, clerk District Court for the Territory of Alaska, Division Four, do hereby certify that the foregoing and hereto annexed four hundred seventy-three (473) pages of typewritten matter, numbered from one (1) to four hundred seventy-three (473), constitute a full, true, and correct copy of the record and the whole thereof as per the preacipe of the defendant in error on file, herein made a part hereof, in the cause wherein the United States of America is plaintiff in error and George Matheson the defendant in error, No. 331, as the same appears of record and on file in my office, and that the said record is by virtue of the writ of error and citation issued in said cause, and the return thereof is in accordance therewith. I do further certify that this transcript was prepared by me in my office, and that the same was made without cost to the said defendant in error in accordance with an order of this court duly made and entered of record.

In witness whereof I hereunto set my hand and seal of the above-entitled court this 14th day of July, 1910.

[SEAL.] C. C. PAGE,
Clerk, District Court of Alaska, Fourth Division.

(Indorsement on cover:) File No. 22,344. Alaska, District Court, 4th Division. Term No. 723. George Matheson, plaintiff in error, vs. The United States. Filed October 12th, 1910. File No. 22,344.

○

Office Supreme Court, U. S.
FILED.
JAN 3 1913
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. ~~720.~~ 148

GEORGE MATHESON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

JAMES WICKERSHAM,
JOHN F. DILLON,
Attorneys for Plaintiff in Error.

SUBJECT INDEX.

	Page
Statement of case	1
Specification of the errors relied upon by the plaintiff in error	3
Brief and argument on first specification of error relied on, contending that the trial jury drawn in and for the Third Division of Alaska had no legal authority as a trial jury in the Fourth Division in the trial of plaintiff in error	4
Assignment of error on objection of plaintiff in error that jury in Third Division was without legal authority to try plaintiff in error in Fourth Division	7
Brief and argument on second specification of errors relied on, contending that the trial judge erred in refusing to admit evidence showing that plaintiff in error was insane	8
Assignments of error on refusing to admit evidence showing that plaintiff in error was insane	8
Assignment of error on refusing to permit witnesses to express opinion that plaintiff in error was insane	8
Brief and argument on third specification of error relied on, contending that the court erred in instructing the jury that the burden was on plaintiff in error to prove his insanity	12
Exception No. 8 to instruction of the court placing burden on plaintiff in error of proving his insanity	12
Assignments of error to instruction of the court placing burden on plaintiff in error of proving his insanity	12
Instruction (first paragraph) placing burden of proof on plaintiff in error to prove his insanity	13
Instruction of the court defining "insanity"	16
Brief and argument on fourth specification of error relied on, contending that the trial court erred in assuming facts and instructing the jury to find the plaintiff in error guilty as charged in the indictment without submitting his defense of insanity	18
Instruction of the court to the jury assuming certain facts and instructing the jury to find the plaintiff in error guilty as charged in the indictment without submitting his defense of insanity	21
Exception to instruction No. 41	21
Conclusions	23

Alphabetical Table of Cases Cited in Brief.

	Page
Am. & Eng. Anno. Cases, Vol. 6, p. 29	11
Century Digest, Vol. 24, "Grand jury," 63	7
Chase *vs.* People, 40 Ill., 352	15
Cyc., 12, 271	7
Davis *vs.* United States, 160 U. S., 469	13
Hopps *vs.* People, 31 Ill., 385	17
Maas *vs.* Territory, 63 Pac. (Okla.), 960	15
People *vs.* McCann, 16 N. Y. (2 Smith), 58	13
State *vs.* Bock, 49 Ore., 25	22
State *vs.* Hatcher, 29 Ore., 309	23
State *vs.* O'Neil, 13 Ore., 183	11
State *vs.* Shuff, 72 Pac. (Idaho), 664	11
Stevens *vs.* State, 31 Ind., 485	18
Taylor on Evidence, p. 809	13
United States *vs.* Beasley, 2 Alaska, 93	7

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 723.

GEORGE MATHESON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error was indicted by the grand jury, in the Third Division of the Territory of Alaska, on the 29th day of December, 1908, as follows, omitting the formal parts of the indictment, which will be found on page 2 of the record: "George Matheson is accused by the grand jury of the Territory of Alaska, Third Division, convened at Fairbanks, by this indictment, of the crime of murder in the first degree, committed as follows: The said George Matheson, on the 24th day of May, A. D. one thousand nine hundred eight, at Chicken Creek, in the Territory of Alaska, Third Division, and within the jurisdiction of this court, unlawfully, feloniously, purposely and of deliberate and pre-

meditated malice, killed one Gus Lawless, by then and there shooting him, the said Gus Lawless, with a loaded revolver or pistol, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. Dated at Fairbanks, in the Territory and division aforesaid, on the 29th day of December, A. D. one thousand nine hundred eight."

The trial of the plaintiff in error began in the District Court for the Territory of Alaska, Fourth Division, on the 8th day of September, 1909, and continued from day to day until on September 11, 1909, the following verdict was rendered by the jury, omitting the formal parts: "Verdict. We, the jury, duly empaneled and sworn in the above-entitled case, find the defendant, George Matheson, guilty of murder in the first degree as charged in the indictment, but 'without capital punishment.' Fairbanks, Alaska, September 11, 1909." (Signed) "J. A. Jesson, Foreman." (Page 11, Printed Record.)

The indictment was found and the verdict rendered under the third and fourth sections of chapter 2 of the Criminal Code of Alaska, Carter's Annotated Alaska Codes, page 2, which sections are as follows:

> "SEC. 3. That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death.
>
> "SEC. 4. That whoever maliciously places an obstruction upon a railroad or street railroad or displaces or injures anything appertaining thereto or does any other act with intent to endanger the passage of any locomotive or car and thereby occasions the death of another, is guilty of murder in the first degree, and shall suffer death. That in all cases where the accused is found guilty of the crime of murder under this and the next preceding section, the jury may qualify their verdict by adding thereto,

'without capital punishment,' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

Under these sections and the verdict of the jury the plaintiff in error was sentenced to imprisonment at hard labor for life, and brought his case to this court for review.

Specification of the Errors Relied Upon by the Plaintiff in Error.

1. That the court erred in overruling the objection of the defendant to the selection of a jury to try this cause from the then present jury, upon the ground that the judge who issued the call was without jurisdiction to issue the same and was not a judicial officer, and that the court now trying the cause had no legal existence at the time of the issuance of said call. (See Printed Record, page 286.)

2. The trial court erred (*a*) in refusing to allow defendant's counsel to introduce evidence showing insanity in defendant's family, and in refusing to allow certain witnesses to express their opinions as to defendant's sanity; (*b*) in its instruction to the jury as to the burden being on the defendant to prove his insanity; (*c*) in its instruction defining the term "insanity," and (*d*) in its instruction numbered thirty-four assuming certain facts to be proved, and in instructing the jury in a mandatory way to find the defendant guilty, without considering his defense of insanity.

BRIEF AND ARGUMENT.

I.

On the beginning of the trial, when the first juror was called and sworn to answer upon his *voir dire,* the attorney for the plaintiff in error reserved his objection to the jurisdiction of the court to try the case (Printed Record, page 11), as follows:

> "Now before examining this juror, if the court please, for the purpose of preserving the record the defendant objects to the selection of a jury from the present panel for the reason that at the time it was called the judge who issued the call for the jury was without jurisdiction to issue such call; that at the time such jury was called the Fourth Judicial Division of Alaska had no existence, that at the time such call was made there was no authority for the calling of a jury for the Fourth Judicial Division of Alaska, and such jury has no legal authority to try this cause.
>
> "By the COURT: The objection is overruled.
>
> "Exception."

By the fourth and fifth sections of "An act making further provisions for a civil government for Alaska, and for other purposes," approved June 6, 1900 (31 Stat. L., 321), Carter's Annotated Alaska Codes, page 132, the District Court of Alaska was created, and so much of the section as is pertinent to the argument is as follows:

> "The court shall consist of three divisions. * * * The judge designated to preside over division numbered three shall reside at Eagle City during his term of office, and shall hold at least one term of court each year at Eagle City, in the district, beginning on the first Monday in July: Provided, The Attorney General may for cause change the place of residence of the judge of either division of the court.

"Each of the judges is authorized and directed to hold such special terms of court as may be necessary for the public welfare or for the dispatch of the business of the court, at such times and places in the district as they or any of them, respectively, may deem expedient or as the Attorney General may direct," etc.

"SEC. 5. The jurisdiction of each division of the court shall extend over the District of Alaska," etc. * * *

This organization of the courts of Alaska into three divisions was amended by the act of March 3, 1909 (35 Stat. L., 838), section two, by the organization of four divisions in Alaska.

Prior to the passage of this act Fairbanks was in the Third Division; by the act of March 3, 1909, Fairbanks became the seat of the court in the Fourth Division.

At the time of the commission of the crime the indictment by the grand jury and the drawing of the trial jury, Chicken Creek, where the crime was committed, and Fairbanks, where the case was tried, were in the Third Division. At the time of the trial each was in the Fourth Division, and the defendant was tried, September 8, 1909, before a judge sitting in the Fourth Division of the Territory of Alaska by a trial jury drawn in and for the Third Division, and was convicted of murder in the first degree on September 11, 1909. To this irregularity this defendant's counsel duly excepted before the empanelling of the jury (Printed Record, page 11).

The trial of defendant by a jury drawn without power to try the case is void, and it is not necessary for the defendant to show actual prejudice to entitle him to a new trial.

In Carter's Annotated Alaska Codes, the following sections in Chapter one, Title II, of the Alaska Criminal Code, page 53, refer to errors in indictments and trials:

"SEC. 49. That the indictment is sufficient if it can be understood therefrom:

"First. That it is entitled in a court having authority to receive it, though the name of the court be not accurately stated;

"Second. That it was found by a grand jury of the political division in which the court was held;

* * * * * * *

"SEC. 50. That no indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

* * * * * * *

"SEC. 152. That neither a departure from the form or mode prescribed by this act, in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid, unless it have actually prejudiced the defendant, or tend to his prejudice in respect to a substantial right."

It will be observed that section 50 provides that no indictment will be insufficient by reason of a defect in a matter of form which does not tend to the prejudice of a substantial right of the defendant on the merits, and section 49 provides that it is sufficient if found by a grand jury of "the political division" in which the court was held. Since section 152 is similar to section 50 it only refers to any error or mistake in pleading or procedure.

Sec. 110, chap. 12, Title II, of the Criminal Code of Alaska, Carter's Annotated Alaska Codes, page 62, is as follows:

"SEC. 110. That an issue of law must be tried by the court, and an issue of fact by a jury of the political division in which the action is triable."

The action in this case was triable in the Fourth Division; the jury was not drawn in and was not "a jury of the

political division," to wit, the Fourth Division, but of the old Third Division.

Using a jury drawn for another division is not merely an error or mistake in pleading or procedure. Such jury is entirely without jurisdiction or authority beyond the "political division" for which it was drawn, or in any "political division" which had no existence at the time of its drawing. U. S. *vs.* Beasley, 2 Alaska Report, p. 93, and vol. 24, Cent. Dig. Grand Jury, 63.

The twenty-third section of the act of March 3, 1909, which created an additional or Fourth Division in Alaska provides:

> "SEC. 23. That this act shall take effect and be in force on and after the first day of July, nineteen hundred and nine. In so far only as the provisions of this act are in conflict with other or prior acts the other or prior acts are hereby repealed."

The jury called for the trial of the plaintiff in error was drawn in the Third Division of Alaska under an order dated by the district judge of the Third Division on June 23, 1909, and the jury was actually drawn in the Third Division under that order, on June 26, 1909. (See page 4, Printed Record.) The change in the division was made under the act of March 3, 1909, to take effect on July 1, 1909, four days after the drawing of the jury in the Third Division, which jury was carried over, without authority of law or any order of court after July 1, 1909, and was the jury which tried the defendant in September after the Fourth Division had been created on July 1, 1909.

The expiration of the term of the court in the absence of a statutory provision to the contrary, discharges a jury in a criminal trial not finished at that time; but this is not an acquittal and the accused may be retried at a subsequent time. 12 Cyc., 271.

Admitting that the jury called by the judge in the Third Division on June 26, 1909, was called in a legal and proper

manner for the Third Division, it seems to follow from the well-reasoned authority of U. S. *vs.* Beasley, 2 Alaska, 93, where this question was substantially considered in reference to the grand jury, that the jury would not have jurisdiction to try cases in the Fourth Judicial Division after the act of March 3, 1909, had taken effect on July 1, 1909, it was not the same "political division," and jurisdiction is specially barred by section 110 above quoted.

II.

The court refused to allow defendant's counsel to introduce evidence showing insanity in defendant's family. Assignment of errors in record commencing on page 286 of the record. Assignments 2, 3, 5, 6, 7, 8, and 9. And refused to allow certain witnesses to express their opinion as to defendant's sanity. Assignments 11, 12, 13, 14, 15, and 16.

The exceptions or these assignments of error are found beginning on page 286 of the record as follows:

Assignments.

2.

That the court erred in excluding the evidence of the witness Robert Matheson, the father of the defendant, as to the blood relationship existing between himself and wife, the mother of defendant. (Record, page 286.)

3.

In refusing to allow the defendant to prove by the said witness, Robert Matheson and others, that insanity exists and is inherited in the family. That a number of the ancestors of the defendant have been insane; that some of the

defendant's relatives, his brothers and sisters, were then insane, and that the defendant has been insane, both before and since the occurrence of the act charged and at the time of the commission of the act. (Record, pages 286-7.)

5.

In sustaining the objection of the plaintiff to the following question asked the witness Robert Matheson, the father of the defendant, "Is either of them (the sisters of the defendant) suffering from any disease at the present time?" (Record, page 287.)

6.

In refusing to allow the defendant to prove by the said witness, Robert Matheson, that one of the defendant's sisters is suffering and has for many years been suffering from epileptic fits, which are an evidence of insanity. (Record, page 287.)

7.

In sustaining the objection of the plaintiff to the following question asked the witness Robert Matheson, the father of the defendant, "Did he take any interest in the affairs of life or in his own affairs." (Record, page 287.)

8.

In refusing to permit the defendant to prove by the witness Robert Matheson, the father of the defendant, that an aunt of his was insane. (Record, page 287.)

9.

In refusing to allow the said witness, Robert Matheson, to answer the following question: "Tell the jury about the girl (defendant's sister) having fits, how often she has them, and when they first commenced?" (Record, page 288).

And in refusing to allow witnesses to express their opinion as to defendant's sanity, the court erred as set forth in assignments

11.

In overruling the following question asked the witness Macdonald, a witness on behalf of the defendant: "And then from the general conduct and from the things that you have related, what is your opinion as to his being sane or insane?" (Record, page 288).

12.

In sustaining the objection to the question asked the witness Furlong, a witness on behalf of the defendant: "From the conversations you had with George Matheson on Chicken Creek on this occasion and his demeanor toward you did you form an opinion as to whether or not he was sane or insane part or all of the time?" (Record, page 288).

13.

In overruling the objection of the defendant to the following question asked the witness Mack, a witness offered on behalf of the plaintiff in rebuttal: "Will you state to the jury whether or not, from your observation and acquaintance with the defendant, he was sane or insane at the time just previous to the offense on the 24th day of May, 1908, Mr. Mack?" (Record, page 288).

14.

In overruling the objection of the defendant to the following question asked the witness Mack by plaintiff: "You would not say he was insane, would you, Mr. Mack?" (Record, page 289).

15.

In overruling the objection of the defendant to the following question asked the witness Lake, a witness offered by the

plaintiff in rebuttal: "You may state, Mr. Lake, whether, in your opinion, from your observation of the defendant and his actions, he was sane or insane at that time" (Record, page 289).

16.

In overruling the objection of the defendant to the following question asked the witness Taylor, a witness offered by the defendant in rebuttal: "From your observation of his action will you state to the jury whether or not, in your opinion, he was sane or insane?" (Record, page 289).

The general and well-established rule is that where the sanity of an individual is in question the insanity of his blood relations in the ancestral line may be shown as tending to establish the fact of insanity. 6 A. & E. Ann. Cases, page 29, and cases cited in note.

In State *vs.* Shuff (Idaho), 72 Pac., 664, it was held that any witness who has known defendant may give an opinion as to his sanity. It is contended that on this point the exclusion of evidence as to the insanity in defendant's family, as was offered to be proved by the testimony of witnesses, and members of the family of defendant, the court did not follow the liberal rulings of the courts of Oregon, which are generally regarded as authority in connection with cases arising in Alaska, since the laws of Alaska are merely a recodification of and were copied from the laws of Oregon.

In State *vs.* O'Neil, 13 Ore., 183, the court said (page 191):

> "It is always best, in cases of a criminal character, particularly where life is involved, that the court should adopt a liberal rather than a rigorous or technical rule in the receipt of evidence for the defense.
>
> " 'Whenever there is any doubt of the question,' said Baldwin, J., 'or rather, whenever the evidence proposed by the defense is not plainly admissible, it is better to let it go in, since, in nine cases out of ten, a single equivocal fact, of doubtful bearing on the case, would have no effect upon the judgment of the

jurors, who are usually disposed to pass, and do pass, upon the general merits (People *vs.* Williams, 18 Cal., 194). And this seems to be the uniform language of the authorities.'"

III.

The court erred in its instruction to the jury as to the burden being on the defendant to prove his insanity (exception numbered VIII, page 277, Printed Record; assignments of error numbered 24 and 25, page 290, Printed Record).

The court erred in its instruction to the jury in the first paragraph of No. 41 in instructing the jury that the burden of proof was on plaintiff in error to prove his insanity.

Plaintiff in error excepted to that instruction as follows:

"VIII.

"The defendant excepts to all that part of instruction numbered XLI given by the court to the jury as contained in paragraph one thereof, for the reason that the same is misleading and does not state the law; and excepts to all that portion of said instruction numbered XLI contained in the last paragraph thereof for the same reason" (page 277, Printed Record).

Plaintiff in error assigned error in both said instructions as follows:

"24.

"That the court erred in giving to the jury in this cause all that part of instruction numbered forty-one contained in paragraph one thereof, to which instruction the defendant duly excepted and said exception was allowed.

"25.

"That the court erred in refusing to give to the jury in this cause the instruction numbered two as it appears in the defendant's requested instructions filed in this cause, to which refusal defendant duly excepted and his exception was allowed."

The language used in the first paragraph in instruction 41 (page 266, Printed Record) is as follows:

"XLI.

> "The law presumes that every man is sane until the contrary appears, and the law presumes the defendant in this case to be sane until the evidence in the case indicates the contrary or raises a reasonable doubt in the minds of the jury as to the sanity of the defendant at the time he killed the said Gus Lawless, if you find from the evidence beyond all reasonable doubt that the defendant did kill the said Lawless at the time and place charged in the indictment herein. * * *"

This places the burden of proving insanity on the defendant—he must overcome the presumption, notwithstanding the plain provision of section 2 of the Criminal Code, which makes "sound memory and discretion" an essential element in murder, to be affirmatively established by the Government.

This is not the law. The burden is upon the State and upon the whole evidence to prove the defendant guilty beyond a reasonable doubt. Davis *vs.* U. S., 160 U. S., 469 (485); 40 L. Ed., 499.

The onus is first on the prisoner to show that the insanity exists, which being done, it immediately shifts upon the prosecution, and it is for it to show that insanity does not exist; or, if it does, that it is not such as would prevent him from knowing and doing right. State *vs.* Shuff, 72 Pac., 664 (669); Taylor on Evidence, p. 809.

In The People *vs.* McCann, 16 N. Y. (2 Smith), 58 (59), the following instruction was held to be bad:

> "The fact of the killing is admitted; that the act was done by the prisoner is not disputed; thus the issue is really reversed from the usual one. The question of his insanity is matter of positive defense, to be affirmatively proved; a failure to prove it is (like the failure to prove any other fact) the misfortune

of the party attempting to make the proof; and in this case, as in all cases of fact, you are not to presume what has not been proved, under the distinctions and upon the principles already given you. The act being plainly committed, and that the prisoner did it being undoubted, and the defense set up on his part that he was insane, the burden of the proof is shifted. In the proof of the deed itself, if any reasonable doubt be left on your minds, the prisoner is to be acquitted; but, as sanity is the natural state, there is no presumption of insanity, and the defense must be proved beyond a reasonable doubt. If (canvassing the whole evidence on the legal principle laid down in the charge) the prisoner has satisfied you so far beyond a reasonable doubt, that you find that he was at the time of the killing so far really insane as not to be responsible (under the distinction stated to you) for this particular act, you acquit; otherwise you cannot."

The substance of the decision in The People *vs.* McCann is fairly stated in the last syllabus, as follows:

"Upon a trial for murder, where the killing by the prisoner is admitted, and his defense is insanity, the prisoner is entitled to the benefit of any doubt resting upon the question of sanity; sanity is a necessary condition to constitute the crime, and the proof thereof a part of the case to be made by the prosecution. Held, therefore, that it is error in the judge, in such case, to charge the jury that, sanity being the normal state, there is no presumption of insanity; that the burden of proving it is upon the prisoner; that a failure to prove it, like a failure to prove any other fact, is the misfortune of the party attempting the proof, and that they must be satisfied of his insanity beyond a reasonable doubt, or otherwise must convict."

On page 65 of the opinion of the court, Brown, J., says:

"It certainly is true that sanity is the normal condition of the human mind, and in dealing with acts, criminal or otherwise, there can be no presumption of insanity. But it is not true, I think, upon the

> traverse of an indictment for murder, when the defense of insanity is interposed and the homicide admitted, that the issue is reversed and the burden shifted. The burden is still the same, and it still remains with the prosecution to show the existence of those requisites or elements which constitute the crime, and of these the intention or *malus animus* of the prisoner is the principal. The doctrine of the charge proceeds upon the idea that the homicide is, *per se*, criminal; that the mere destruction of human life by the act of another is, without any other circumstance, murder, or some of the degrees of manslaughter."

And on page 67 the court said:

> "Sound memory and discretion at the time of killing is oftentimes the only material question upon the trial of an indictment for murder. They are essential elements of the crime, to be established upon the trial as a part of the case of the prosecution.

"Sound memory and discretion" are elements in the very definition of murder, under section 3 of the Alaska Code, and are to be affirmatively established by the prosecution.

To the same effect is Maas *vs.* Territory, 63 Pac., 960, quoting from the syllabus:

> "Where one is being tried for murder, and his defense is insanity, lunacy, or unsoundness of mind at the time of committing the act, the defendant, in the first instance, is presumed to be sane and of sound mind, and the burden is upon him to introduce sufficient evidence to raise a reasonable doubt of his sanity. When he has done this, the territory, before conviction can be had, is required to prove his sanity beyond a reasonable doubt."

In Chase *vs.* People, 40 Ill., 352 (358), the court said:

> "What we designed to say in that case" (Hopps *vs.* The People, 31 Ill., 385) "was simply this: That

sanity is an ingredient in crime as essential as the overt act, and if sanity is wanting there can be no crime, and if the jury entertain a reasonable doubt on the question of sanity, the prisoner is entitled to the benefit of the doubt. We wish to be understood as saying, as in that case, that the burden of proof is on the prosecution to prove guilt beyond a reasonable doubt, whatever the defense may be. If insanity is relied on and evidence given tending to establish that unfortunate condition of mind, and a reasonable, well-founded doubt is thereby raised of the sanity of the accused, every principle of justice and humanity demand that the accused shall have the benefit of the doubt.

"We do not desire to be understood as holding the prosecution to the proof of sanity in any case, but we do hold, where evidence of insanity has been introduced by the accused, and a reasonable doubt of his sanity is thereby created, the accused cannot be convicted of the crime charged."

The instruction of the trial court, defining the term "insanity" given in the 36th charge (page 263, Printed Record) to the jury, is not a correct statement of the law:

"XXXVI. You are further instructed that the term 'insanity' used in these instructions means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong at the time of the commission of the act, or unconscious at the time of the nature of the act, or when though conscious of the act and able to distinguish right from wrong and know that the act is wrong, yet his will (by which is meant the governing power of his mind) has been so completely destroyed that his actions are not subject to it, but are beyond his control."

1st. A man may be insane and not responsible for a particular act and yet know the difference between right and wrong.

2d. The instruction is ambiguous, as it is not clear from the language used that the mental derangement need be only temporary, and at the time of the actual commission of the crime. This point is made all the more misleading from the opening paragraph of the following charge.

> "XXXVII. The court instructs the jury that the nature, character, and degree of insanity which exonerates a party from criminal responsibility is not easily explained or understood."

The law on this point is clearly stated in Hopps *vs.* People, 31 Ill., 385 (391), as follows:

> "* * * we have come to the conclusion that a safe and reasonable test, in all such cases, would be, that whenever it should appear from the evidence, that at the time of doing the act charged, the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act, but for that affection, he ought to be acquitted. But this unsoundness of mind or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged by overriding the reason and judgment, and obliterating the sense of right and wrong as to the particular act done and depriving the accused of the power of choosing between them. If it be shown the act was the consequence of an insane delusion, and caused by it, and nothing else, justice and humanity alike demand an acquittal."

In Maas *vs.* Territory, 63 Pac. (Oklahoma), 960, the instruction:

> "And that he knew and was conscious at the time that what he was doing was wrong, and punishable by the law of this territory."

was held alone to be insufficient.

In Stevens *vs.* State, 31 Ind., 485 (488); 99 Am. Dec., 634, the following instruction was held not to be in accordance with the law:

> "If the jury believe from the evidence that the defendant knew the difference between right and wrong in respect to the act in question, if he was conscious that such act was one which he ought not to do, and if that act was at the same time contrary to the law of the State, then he is responsible for his acts."

The court also said (page 490):

> "The law was much better put by Judge Brewster in Commonwealth *vs.* Haskell (see 4 Am. Law Rev., 240), thus, 'that the true test lies in the word power. Has the defendant in a criminal case the power to distinguish right from wrong, and the power to adhere to the right and to avoid the wrong? Has the defendant, in addition to the capacities mentioned, the power to govern his mind, his body, and his estate?'
>
> "Indeed there are very strong reasons for holding that the charge of Chief Justice Perley in The State *vs.* Pike (see 4 Am. Law Rev., 245-6) is the true law on this subject. He instructed the jury 'that the verdict should be not guilty by reason of insanity' if the killing was the offspring or product of mental disease in the defendant; that neither delusion nor knowledge of right and wrong, nor design or cunning in planning and executing the killing, and escaping or avoiding detection, nor ability to recognize acquaintances, or to labor, or transact business, or manage affairs, is, as a matter of law, a test of mental disease; but that all symptoms and all tests of mental disease are purely matters of fact to be determined by the jury."

IV.

In instruction number thirty-four (Record, page 262) the court erred in assuming certain facts to be true, and in mandatorily instructing the jury to find the defendant

guilty upon certain assumed facts, entirely excluding therefrom plaintiff in error's defense of insanity. The instruction is so strongly worded against the accused, assumes such facts, and is stated in such mandatory terms that it practically amounts to an instruction to find the plaintiff in error guilty as charged in the indictment.

The instruction complained of is as follows (pages 262-3, Printed Record):

"XXXIV.

"You are instructed that, if you find and believe from the evidence in this case beyond all reasonable doubt, that the defendant George Matheson and the deceased Gus Lawless had a quarrel or personal conflict in the place known in the evidence as Struck & Van Hook's saloon, at Chicken Creek, at the time mentioned in the indictment, and that thereafter and when the said quarrel or conflict was concluded and within about an hour and a half or two hours thereafter, the defendant Matheson procured a loaded revolver or pistol in the said Struck & Van Hook's saloon, and remarked at said time after firing off said pistol into the floor, that he guessed that would do, and the said defendant Matheson immediately left the said premises of the Struck saloon and proceeded to the post-office or road-house owned by the said Struck and run by one Scott Holbrook, where the deceased Lawless was at the time immediately after having taken his supper at said road-house, and that the said defendant, although warned and urged by various persons who have testified as witnesses in this case that he should not go to the said post-office or road-house to have any trouble or pick any quarrel with the said Gus Lawless, did proceed to said road-house, wherein the said Lawless was at the time, and as soon as he had entered said road-house through the front door thereof immediately discharged a loaded revolver or pistol at said Gus Lawless three successive times, maliciously and purposely and with deliberate and premeditated malice, and with intent then and there to kill the said Gus Lawless, and that said third shot did kill the said Lawless; or if you find

and believe from the evidence in this case beyond all reasonable doubt that the said defendant, George Matheson, for the purpose of wreaking vengeance on the said Gus Lawless, procured such loaded revolver or pistol and went to the said road-house wherein the said Lawless was at that time, and purposely and maliciously and with deliberate and premeditated malice, discharged the said loaded revolver at and into the body of the said Gus Lawless, with intent then and there to kill him, the said Gus Lawless, in a spirit of revenge, and that said third shot did kill said Lawless, then you should find the defendant guilty as charged in the indictment.

"You are further instructed that it makes no difference who was the aggressor in the quarrel or conflict had between the deceased Lawless and the defendant George Matheson in the said Struck's saloon, if you find that they had such quarrel or conflict prior to the time, the defendant after procuring the said loaded revolver or pistol in said saloon proceeded maliciously and purposely and with deliberate and premeditated malice in his mind to the post-office or road-house where the said Gus Lawless was at that time located, and with intent to kill the said Gus Lawless, and that he did then and there kill the said Lawless, if you find from the evidence beyond all reasonable doubt that the defendant did leave the said Struck & Van Hook's saloon building so armed and for such purpose, then and in that event you should find the defendant guilty as charged in the indictment."

To this instruction the defendant excepted (Printed Record, page 276, exception 4) as follows:

"IV.

"The defendant excepts to the court's instruction numbered XXXIV. given to the jury, for the reason that the same tends to prejudice the jury against the rights of the defendant; that it invades the province of the jury and assumes certain facts therein enumerated as proven, and that, read as a whole, it is and has the practical effect of instructing the

jury to find the defendant guilty; that such instruction does not state the law, and that the rules therein stated as law are against law."

Section three of title I, chapter 2, of the Criminal Code of Alaska (Carter's Annotated Alaska Codes, page 2) provides:

> "SEC. 3. That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice * * * kills another, is guilty of murder in the first degree, and shall suffer death."

The instruction thirty-four, complained of, makes no reference to the exception in section three stated in the first line in the following words: "being of sound memory and discretion." The instruction recites certain facts as substantially found by the court and mandatorily instructed the jury that if they find those certain facts to be true they "should find the defendant guilty as charged in the indictment," without submitting along with those facts the question of his "being of sound memory and discretion." The instruction entirely excludes his defense of insanity.

It may be said in answer that this defense is submitted by the court in other instructions, but instruction thirty-four is not cured by any subsequent instruction which does not refer to it; instruction thirty-four does not refer to any other instruction, but purports, in a most forceful way, to instruct the jury if it shall find the facts stated in instruction number thirty-four to find the defendant "guilty as charged in the indictment."

It is submitted that fairly the court in this instruction assumed certain facts to be true, and especially in these words, "that the said defendant although warned and urged by various persons who have testified as witnesses in this case that he should not go to the said post-office or road-house to have any trouble or pick any quarrel with the said Gus Lawless, did proceed to said road-house wherein the said Lawless

was at the time; and as soon as he had entered said roadhouse through the front door thereof immediately discharged a loaded revolver or pistol at said Gus Lawless three successive times, maliciously and purposely and with deliberate and premeditated malice, and with intent then and there to kill the said Gus Lawless, and that said third shot did kill the said Lawless." It may be that in a Federal court a judge has some latitude in commenting upon the facts in a case of this nature, but certainly under the Code of Alaska, which was drawn from the Code of Oregon, there is no justification for an instruction of this kind.

Section 110, chapter 12, of title II of the Criminal Code of Alaska, Carter's Annotated Alaska Codes, page 62, reads as follows:

> "SEC. 110. That an issue of law must be tried by the court and an issue of fact by a jury of the political division in which the action is triable."

Section 157, in chapter 16 thereof, page 71, reads as follows:

> "SEC. 157. That although the jury have the power to find a general verdict, which includes questions of law as well as fact, they are bound, nevertheless, to receive as law what is laid down as such by the court; but all questions of fact other than those mentioned in the last section must be decided by the jury, and all evidence thereon addressed to them."

The same rule prevails in Alaska, upon this point, as in Oregon, for the Codes are substantially alike.

In State *vs.* Bock, 49 Ore., 25 (29), the court said:

> "2. An exception having been taken to the following instructions, it is contended by defendant's counsel that an error was committed in giving it, to wit:
>
> " 'It it not necessary, in a case of an indictment for assault with a dangerous weapon, to prove specific intent; that is, to prove a specific intent to commit the assault. The law will presume this intent to commit the assault,—that is, to commit the assault in the

manner alleged—from the fact that the defendant was armed with a dangerous weapon, and that he made an assault while so armed with such weapon."

* * * * * * *

"The court assumes, however, from the instruction, that he was armed with a weapon with which he made an assault. The use of the word 'defendant' in the part of the charge complained of shows that the instruction is not hypothetical; but, as it assumes the existence of facts which are disputed, an error was committed as alleged. State *vs.* Mackey, 12 Ore., 154 (6 Pac., 648); State *vs.* Bowker, 26 Ore., 309 (38 Pac., 124); State *vs.* Hatcher, 29 Ore., 309 (44 Pac., 584). For the error commited in giving the instruction the judgment is reversed, and a new trial is ordered."

In State *vs.* Hatcher, 29 Ore., 309 (319), the court said:

"The statute provides that 'in charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact.' Section 200, Hill's Code. The court very properly instructed the jury that they were the exclusive judges of all questions of fact put in issue by the defendant's plea, and that the burden was on the State to establish the allegations of the indictment beyond a reasonable doubt, but such a general instruction cannot correct a violation of the statutory prohibition. An instruction that assumes the existence of a fact which should be left to the jury for ascertainment is erroneous. Yarnberg *vs.* Watson, 13 Ore., 11 (4 Pac., 296.) It follows that the judgment is reversed, and a new trial ordered."

Conclusion.

In conclusion it is respectfully submitted:

1. That the error in trying the plaintiff in error over his objection, with a jury drawn in and for the Third Division of Alaska, when at the time of the trial the place of trial of the

defendant and the place where the crime was committed were all in the Fourth Division, for which the jury had not been drawn, made the trial void from the beginning, and it is not necessary for the defendant to show actual prejudice in this record.

2. That the error committed in the trial court in (*a*) refusing to allow defendant's counsel to introduce evidence showing insanity in defendant's family and in refusing to allow certain witnesses to express their opinion as to defendant's sanity;

(*b*) The instruction to the jury as to the burden of proof being upon the defendant to prove his insanity;

(*c*) The instruction of the trial court defining the term "insanity," have prejudiced the defendant so that he did not have a fair trial;

(*d*) The error of the court committed by the giving of the instruction number thirty-four over the objection and exception of the plaintiff in error, which assumes the facts and instructs the jury in a mandatory way to find the defendant guilty as charged in the indictment without submitting in the same instruction his defense of insanity, prejudiced the defendant so that he did not have a fair trial.

Counsel for plaintiff in error respectfully submit the cause upon the brief and waive oral argument.

JAMES WICKERSHAM,
JOHN F. DILLON,
Attorneys for Plaintiff in Error.

INDEX.

I.

	Page.
STATEMENT OF THE CASE	1
1. Facts established by prosecution	1
2. Facts brought out by defendants to show insanity	3
3. Rulings and instructions on which error was assigned	3, 6

II.

BRIEF OF ARGUMENT	7

III.

ARGUMENT	7
1. The court's rulings on the evidence were correct	7
(a) Within the discretion of the court and not reviewable here	7
Turner *v.* American Security & Trust Co., 213 U. S., 257	8
(b) Correct in each instance	8
Ford *v.* State, 71 Ala., 385	11
In re Estate of Wilson, 78 Nebr., 758	11
Lane *v.* Moore, 151 Mass., 87	11
People *v.* Borgetto, 99 Mich., 336	11
Raub *v.* Carpenter, 187 U. S., 159	10
State *v.* Crowe, 39 Mont., 174	11
State *v.* Lyons, 113 La., 959	11
State *v.* Soper, 148 Mo., 217	11
Thiede *v.* Utah, 159 U. S., 519	8
Turner *v.* American Security & Trust Co., supra	10
Walsh *v.* People, 88 N. Y., 458	9
Abbott's Trial Brief (Mode of Proving Facts), 428	11
Rice, Criminal Evidence, sec. 21	11
1 Wigmore, Evidence, sec. 233	11
2. The court's instructions were free from error	12
(a) Definition of insanity was correct	12
Davis *v.* U. S., 165 U. S., 373	13
Hotema *v.* U. S., 186 U. S., 413	13
Marrin *v.* U. S., 167 Fed., 951	13
Ritter *v.* Mutual Life Ins. Co., 169 U. S., 139	13
Spreckels *v.* Brown, 212 U. S., 208	13
Maxwell Land Grant Co. *v.* Dawson, 151 U. S., 586	13

ARGUMENT—Continued.
2. The court's instructions were free from error—Continued. Page.
(b) Reasonable doubt of insanity was held enough to acquit 14
Davis v. U. S., 160 U. S., 469 14
Davis v. U. S., 165 U. S., 373 14
Hotema v. U. S., supra 14
(c) Instruction XXXIV does not invade province of jury .. 14
State v. Hatcher, 29 Oreg., 309 16
1 Lord's Oregon Laws, 210, sec. 139 16
Id., 777, sec. 1525 16
30 Stat., 1253, sec. 3 16
30 Stat., 1285 16
31 Stat., 361, sec. 191 16
3. The objection to the trial jury is without merit 16
Agnew v. U. S., 165 U. S., 36 22
~~Barrett v. U. S., 169 U. S., 218~~ 16
Bird v. U. S., 187 U. S., 118 ..... 21, 22
Breese v. U. S., 226 U. S., 1 22
Clement v. U. S., 149 Fed., 305 20
Clinton v. Englebrecht, 13 Wall., 434 23
Logan v. U. S., 144 U. S., 263 22
Powers v. U. S., 223 U. S., 303 23
Rosencrans v. U. S., 165 U. S., 257 ..... 21, 22
Spencer v. U. S., 169 Fed., 562 20
U. S. v. Beasly, 2 Alaska, 93 22
Revised Statutes, sec. 802 20
30 Stat., 1286, ch. 4 20
30 Stat., 1296, ch. 12, sec. 110 19
30 Stat., 1297, ch. 14, sec. 119 20
31 Stat., 322, sec. 4 16
31 Stat., 323, sec. 5 16
32 Stat., 385 17
35 Stat., 839, sec. 2 17
35 Stat., 842, sec. 8 17

IV.

CONCLUSION 23

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

GEORGE MATHESON, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 148.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE FOURTH DIVISION OF THE TERRITORY OF ALASKA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

In September, 1908, plaintiff in error was tried and convicted at Fairbanks, in the Fourth Division of Alaska, for the murder of one Gus Lawless. The verdict was "guilty of murder in the first degree but without capital punishment," and a sentence of life imprisonment was imposed. (R., 279, 285.) The case is here upon writ of error.

From the witnesses called by the Government it appeared that on May 24, 1908, plaintiff in error had been drinking in a saloon at Chicken Creek, Alaska, with Gus Lawless and several other men, among them Joe Lawless, brother of Gus, when a dispute

arose over the relative abilities of Gus Lawless and one Anderson as wrestlers. Plaintiff in error, angered at some wholly innocent remark made by Joe Lawless in this connection, assaulted the latter and knocked or threw him down, whereupon Gus Lawless interfered and pulled the combatants apart, saying they would have to go outside if they wanted to fight. Plaintiff in error, however, at once renewed the attack on Joe Lawless, who was distinctly intoxicated at the time. Gus thereupon joined in the fracas in his brother's behalf, knocked plaintiff in error down, got on top of him and pounded him with his fists until the spectators intervened. (R., 108–111, 117–122, 133–135, 140–142, 154–155, 160–161, 165, 171, 177–179.)

An hour or more after this conflict plaintiff in error was found standing behind the bar of the saloon with a loaded revolver in his hand. After firing it off into the floor with the remark that he guessed it would do, he proceeded in the direction of the building where Gus Lawless had been eating supper, 75 or 100 feet away. In spite of the remonstrances of several witnesses and the attempt of at least one of them to stop him, plaintiff in error entered the front room of the building, where Gus Lawless and several others were sitting, with the revolver in his hand. Gus Lawless at once advanced toward him and caught him by the wrist, apparently in an attempt to disarm him. Plaintiff in error brought his gun arm around and fired twice, the second shot apparently striking Gus Lawless, who fell to the floor. Plaintiff in error

thereupon stood over his victim and fired a third shot, which struck Gus Lawless in the head, causing his death. (R. 112–114, 127–130, 135–140, 148–152, 156–158, 166–168, 173–174, 179–182.)

No defense on the facts was made, and it thus appears that the accused had committed a deliberate and premeditated murder.

The defense was insanity; and to establish it seven witnesses were called, including the father and mother of the accused. The attempt was made to show abnormality in collateral relatives of the accused, peculiar actions on his part, and the opinions of witnesses that he was insane. The principal errors assigned are to the rulings of the court upon this evidence. The assignments of error are not only fragmentary and unintelligible, but they are largely inaccurate and frequently directly contrary to the true facts.

A brief examination of this evidence (R., 182–242) and of that offered in rebuttal (R., 242–250) will show not only that the accused was perfectly sane, but that the trial court was extremely solicitous to give to the accused the benefit of every scrap of evidence to which he could by any possibility be entitled.

The plaintiff in error was 24 years old at the time of the homicide (201); he was an only son and the youngest of five children (184); his parents were cousins, natives of Nova Scotia (183), and the family had entered Alaska in 1894; in 1899 accused was taken by his mother to Los Angeles and brought

back to Alaska by his father in 1903, returned to California after a year, and had finally come back to Alaska in 1906 (201, 202).

The plaintiff in error had in general enjoyed good physical health (188), and no doctor had ever been consulted as to his mental condition (207); he had had no schooling; and was reluctantly described by his father as bad tempered, self-willed, strong headed, and at times absolutely beyond control (196); he was quarrelsome and always ready to fight (McDowell, 218).

The burden of establishing the insanity of accused fell upon his parents. There is no medical evidence in the case, and the exact nature of the boy's mental disease is nowhere attempted to be stated. The mother did not in terms express an opinion that the son was insane; the father did say that he thought the son was not in his right mind; but the whole spirit of their testimony shows that at the time of the trial they had convinced themselves that they had always feared he was not right mentally. Significant of their real belief is the reluctant admission of the father on cross-examination that he had never told anybody of his suspicion of the boy (198), and the statement of the mother that she had consulted the best doctor in Los Angeles about the mental condition of one of her daughters (206), but had never consulted a doctor about her son's mental condition (207).

The only facts testified to by Mrs. Matheson to show her son's insanity were that he did not like to go to school (203); that when he came home (to Los

Angeles) in 1905 he acted very queer, would simply sit and listen to her when she talked to him and say he did not hear (204); that he would mind her only when he wanted to; that she whipped him when he was six years old, from which he fainted (207).

The father testified that George could not learn at school; that when he got mad he could not seem to understand and was uncontrollable; that he was constantly quarreling; that sometimes after a quarrel was over he would not know that he had quarreled; that this condition got worse as he grew older (186–188).

One McDowell had been acquainted with the accused since 1903 (208), and expressed the opinion that there was something wrong mentally with him (213). He based his opinion on the fact that the accused frequently stared into space, would not go to school, and was very quarrelsome.

One Furlong, who had known the accused in 1904 but had not seen him since, expressed the opinion that the latter was of unsound mind, after describing a quarrel between them in that year, but the opinion was stricken out as too remote (227, 228).

Mrs. Rothenberg noticed that accused was nervous and fidgety, and would not go to school, and thought he was of unsound mind (228–230).

Hall, a guard at the jail during Matheson's confinement, thought he was nervous and not in his right mind at times (234–238); while Peterson, another guard, had not formed any opinion of his sanity (241).

The evidence to show insanity among the collateral relatives was even weaker.

The father testified that two of his daughters had been feeble-minded from childhood, one of them having epileptic fits, and their condition he described in great detail. He also testified that there was something wrong about one of his father's aunts and one of his mother's sisters (190, 199).

Mrs. Matheson also had a half sister and her father had an aunt who were said to be feeble-minded (204, 205). There are some exceptions to the rulings of the court on this evidence, but the court ultimately let it all in.

In rebuttal the Government called half a dozen witnesses who testified that the accused was sane.

Upon the conclusion of the evidence the court charged the jury fully, giving the usual definition of insanity, and charging that they could not convict if they had a reasonable doubt of the defendant's sanity. (R., 263–267.)

Error is assigned on these instructions as well as on the 34th, which, it was alleged, stated the court's view of the facts. (R., 262–263.)

The final objection is to the legality of the petit jury. (R., 11–12.) There is but one court for Alaska, sitting in several divisions, each division having jurisdiction throughout the district. Fairbanks was in the third division but by an act effective July 1, 1909, that part containing Fairbanks was called the fourth division, but continued with all the judicial officers of the third. The present case came

on at the July term, 1909, at Fairbanks. The jurors for that term were drawn in the month of June. The objection is made on the ground that Fairbanks was then in the third division.

BRIEF OF ARGUMENT.

I. The rulings of the trial court on the evidence were:

(*a*) Within the discretion of the trial court, which discretion will not be reviewed here.

(*b*) Correct in each instance.

II. The instructions were correct.

(*a*) Insanity was properly defined.

(*b*) The jury were correctly told they must acquit if the insanity evidence raised a reasonable doubt of defendant's sanity.

(*c*) The province of the jury was not invaded.

III. The trial jury was legal.

ARGUMENT.

I.

The court's rulings on the evidence were correct.

(*a*) *The rulings were within the discretion of the court and will not be reviewed here.*

The insanity was sought to be established by proof of actions of the accused, the opinions of those who knew him, and proof of insanity among collateral relatives.

The admission and rejection of the items of such evidence depended in each instance upon the circumstances, and the rulings of the trial court were pre-

eminently within its discretion, and will not be reviewed here.

Turner v. *American Security & Trust Co.*, 213 U. S., 257, 260.

(*b*) *Each of these rulings was correct.*

1. Assignment 2 goes to the exclusion of the blood relationship between the parents of accused (Brief, 8).

The evidence was in fact received, and while the court said it should be excluded temporarily it was not formally stricken out. (R. 183.) The ruling was provisional only, no exception was taken to it, and the offer was not renewed. It will not, therefore, be reviewed.

Thiede v. *Utah*, 159 U. S., 519.

The ruling was correct. The probative value of such testimony is not a fact of judicial notice, but one to be established by medical or other competent evidence. No proffer of such evidence was made in this case.

2. Assignment 3 (Brief, 8, 9) is exceedingly general, and the references to the record being incorrect, it is impossible with accuracy to ascertain precisely what is meant.

If the ruling of the court on page 183 of the record is meant, no exception was taken, besides which, the court ruled only on the specific question discussed in assignment 2, and not on the general offer of evidence.

If the ruling on pages 184 and 185 of the record is meant, it is enough to say that the court there simply outlined the plan which should be followed in presenting the evidence of insanity. As a matter of

fact, the court did thereafter receive all legal evidence which was offered on this point.

3. Assignments 5 and 6 allege a refusal to permit Robert Matheson to answer whether either of his feeble-minded daughters was suffering from *any disease* or from epileptic fits (R. 186); while assignment 9 is no doubt intended to reach the exception to a question put to Mrs. Matheson (R. 204) on the same subject.

The first question was clearly improper because not confined to mental diseases.

The other rulings were also correct because no effort was made to show that epilepsy is hereditary or an indication of insanity, nor that the plaintiff in error was epileptic. Testimony to this effect was needed to make the proffered evidence material.

Walsh v. *People*, 88 N. Y., 458, 466.

But as a matter of fact this evidence was all brought out in the fullest detail in the testimony of both the father and mother of the accused and was before the jury for what it was worth. (R., 195, 196, 206.)

4. The seventh assignment alleged that the court refused to permit the father to answer whether the accused took any interest in the affairs of life. (Brief, 9.)

This question was put on page 189 of the record, and there was no exception to the court's ruling as such, but only to the *remarks* of the court. As a matter of fact, both the father and mother were allowed to testify freely to all actions of the accused which might tend to show his lack of interest in

life, and it was clearly within the court's discretion to say whether this specific question should be answered.

5. The eighth assignment is to the court's refusal to permit the father to state baldly that an aunt was insane. (Brief 9.)

The court held (R., 189) that the witness must first state the facts from which he inferred the insanity. This is the rule as laid down by this court.

> *Raub* v. *Carpenter*, 187 U. S., 159.
> *Turner* v. *American Security and Trust Co.*, *supra*.

The wisdom of this particular ruling is apparent from the meager facts which the witness was able to state as tending to show insanity on the part of his aunt. (R., 190, 199.)

6. The eleventh assignment is directly contrary to the facts. (Brief, 10.)

The witness was named McDowell, not MacDonald, and was permitted to express his opinion that there was something mentally wrong with accused. (R., 213–214.)

7. Assignments 12, 13, 14, 15, and 16 (Brief, 10, 11) have reference to further efforts made by the defense to prove lunacy, and the attempts of the prosecution to establish sanity, by the opinions of witnesses.

Assignment 12 raises the admissibility of the opinion of one Furlong. (R. 225.) The opinion was based on a quarrel occurring four years before the homicide, since which time the witness had not seen

the accused; the facts were held too remote (225). The ruling was clearly within the court's discretion.

State v. *Crowe*, 39 Mont., 174, 179.
Lane v. *Moore*, 151 Mass., 87, 90.
1 Wigmore, Evidence, sec. 233.

Assignments 13, 14, 15, and 16 deal with the opinions of the Government witnesses that plaintiff in error was sane, which opinions were received only after the witnesses had shown their opportunities for observation and had testified that there was nothing unusual or abnormal in his conduct.

There is a well-recognized distinction between proof of insanity, and of sanity, by means of opinion evidence. Those courts which hold that in seeking to prove the former condition the facts on which the opinion is based must first be stated, recognize that the reason for the rule fails where the attempt is to prove sanity. Accordingly, it is held that a recital of facts indicating sanity is not an essential prerequisite to the expression of an opinion of the latter sort.

People v. *Borgetto*, 99 Mich., 336, 340.
Ford v. *State*, 71 Ala., 385, 397.
State v. *Soper*, 148 Mo., 217, 235.
State v. *Lyons*, 113 La., 959, 981.
In re Estate of Wilson, 78 Neb., 758.
Abbott's Trial Brief (Mode of Proving Facts), 428;
Rice, Criminal Evidence, sec. 21.

The distinction is founded in reason and good sense. The conclusion that a given person is insane arises of necessity from certain abnormalities of

speech or conduct. While not all of these can be adequately described to a jury, a witness of ordinary intelligence can give sufficient account of them to indicate some basis for the opinion he has formed. The belief in a person's sanity, however, arises from a thousand wholly natural words and acts which, by reason of their very normality, have left no clear or lasting impression upon the witness. Nor would an account of them, if it were possible, be of any value to a jury; for obviously one may do or say a thousand sane things while legally irresponsible. The rule adopted by the court was sound on principle and authority.

II.

The court's instructions were free from error.

(*a*) *Definition of insanity.*

Upon this subject the court instructed the jury:

> You are further instructed that the term "insanity" used in these instructions means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong *at the time of the commission of the act*, or unconscious at the time of the nature of the act, or when, though conscious of the act and able to distinguish right from wrong and know that the act is wrong, yet his will (by which is meant the governing power of his mind) has been so completely destroyed that his actions are not subject to it but are beyond his control. (R., 263, 264, 276.)

The definition is in accord with the authorities, and, taken in connection with the rest of the instruction on the subject, particularly the second and fifth paragraphs of the next instruction (R., 264), is at least as favorable to plaintiff in error as the law permits.

Davis v. *U. S.*, 165 U. S., 373, 378.
Hotema v. *U. S.*, 186 U. S., 413.
Ritter v. *Mutual Life Ins. Co.*, 169 U. S., 139.

The contention that the instruction does not make it clear that insanity need only exist "at the time of the actual commission of the crime" (Brief, 17) is answered by a mere reading of the instruction itself.

Error is assigned on the following portion of instruction XXXVII given by the court:

> The court instructs the jury that the nature, character, and degree of insanity which exonerates a party from criminal responsibility is not easily explained or understood. (R., 264, 276, 277.)

The criticism is that the language was misleading. Taken in connection with the entire instruction, the objection seems fanciful. However, the instruction was given at the request of the accused (R., 268, 269) and can not be objected to by him.

Spreckels v. *Brown*, 212 U. S., 208.
Maxwell Land Grant Co. v. *Dawson*, 151 U. S., 586, 606.
Marrin v. *U. S.* (C. C. A., 3d C.), 167 Fed., 951.

(b) *Reasonable doubt of insanity was held enough to acquit.*

Instruction XLI is criticized as throwing upon the accused the burden of proving insanity. In fact, the instruction directs that it is enough to raise a reasonable doubt of defendant's sanity. The first paragraph of the instruction reads:

> The law presumes that every man is sane until the contrary appears, and the law presumes the defendant in this case to be sane until the evidence in the case indicates the contrary or raises a reasonable doubt in the minds of the jury as to the sanity of the defendant at the time he killed the said Gus Lawless, if you find from the evidence, beyond all reasonable doubt, that the defendant did kill the said Lawless at the time and place charged in the indictment herein. (R., 266–267.)

This is a correct statement of the law as enunciated by this court; and taken in conjunction with the rest of instruction XLI and with instruction XL (R., 266) leaves no loophole for misapprehension on the part of the jury, and is quite unexceptionable.

Davis v. *U. S.*, 160 U. S., 469, 485.
Davis v. *U. S.*, 165 U. S., 373, 378.
Hotema v. *U. S.*, *supra*, at 416.

(c) *Instruction XXXIV does not invade the province of the jury.*

The objection urged against this instruction (R., 262, 290), that it invades the province of the jury

(R., 276), has no foundation in fact. The passage particularly relied on by plaintiff in error—

> that the said defendant, although warned and urged by various persons who have testified as witnesses in this case that he should not go to the said post office or road house to have any trouble or pick any quarrel with the said Gus Lawless, did proceed to said road house wherein the said Lawless was at the time, and as soon as he had entered said road house through the front door thereof immediately discharged a loaded revolver or pistol at said Gus Lawless three successive times, maliciously and purposely and with deliberate and premeditated malice, and with intent then and there to kill the said Gus Lawless, and that said third shot did kill the said Lawless—

is obviously subordinate to the opening clause:

> If you find and believe from the evidence in this case beyond all reasonable doubt.

The passage was therefore entirely hypothetical, and could not have been understood otherwise by the jury or by anyone else except plaintiff in error. A careful examination of the entire instruction fails to reveal the assumption of a single fact as proven; and, far from invading the jury's proper sphere or substantially directing a verdict, the court scrupulously refrained from even expressing an opinion upon the evidence. That it was entitled to express such an opinion admits of little doubt. The Oregon cases to the contrary effect, relied on by plaintiff in error (Brief, 22, 23), seem to rest upon the

statutory provision quoted in *State* v. *Hatcher* (29 Ore., 309, 319) that "the court * * * shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact." This provision is contained in a chapter of the Oregon Code of Civil Procedure (1 Lord's Oregon Laws, 210, sec. 139), expressly made applicable to criminal trials (Id., 777, sec. 1525). The same provision appears in the Alaska Code of Civil Procedure (31 Stat., 361, sec. 191), but is not contained nor incorporated by reference in the Code of Criminal Procedure for the Territory (30 Stat., 1285). This distinction disposes of plaintiff in error's argument based on the fact that "the Codes are substantially alike." (Brief, 22.) We do not press this point, however, as the instruction is unexceptionable even from the standpoint of the Oregon courts. The instruction states fully and accurately the elements of first-degree murder as defined by the statute (30 Stat., 1253, sec. 3), with the exception of the requisite "sound memory and discretion" of the person accused, and that omission could not have prejudiced plaintiff in error in view of the seven instructions immediately following (R., 263–267), which are exclusively devoted to the defense of insanity and set forth in unmistakable terms the jury's duty in regard thereto.

III.

The objection to the trial jury is without merit.

The act of June 6, 1900, section 4 (31 Stat., 322), established a district court for Alaska, to consist of three divisions, each division having jurisdiction

throughout the district (Ib., 323, sec. 5). The act of June 13, 1902 (32 Stat., 385), defined the boundaries of the three divisions.

The act of March 3, 1909, section 2 (35 Stat., 839), amended the earlier law so as to provide for four instead of three divisions of the court; the original third division began at the Arctic Ocean and ran down to the Pacific Ocean, including the Aleutian Islands; speaking roughly, the act of 1909 divided the division, directing that the south half should continue to be called the third division, while the north half should be called the fourth division. Fairbanks and Chicken Creek, where the murder was committed, are in the fourth division.

The amendment was to become effective July 1, 1909, and it was expressly provided in section 8 that nothing contained in the act should terminate the office of any of the judges, district attorneys, or marshals, and that those officers then serving in the third division should thereafter have their residences and hold their respective offices in the fourth division. (Ib., 842.)

The judges are appointed for the district and are assigned to the several divisions by the President.

The crime was committed May 24, 1908; the indictment was returned December 29, 1908, and arraignment had the next day. (R., 2, 3.) A general term of the court for the fourth division at Fairbanks was set for July 5, 1909. (R., 3.) In the month preceding, a general term was held at Fairbanks, then in the third division. In order to obtain

the jury for the July term, a jury commissioner was appointed in the regular way on June 23, and on June 26 he and the clerk of the court drew the grand and petit jurors for the July term. (R., 3–5.) An examination of the map shows apparently that all of these jurors were residents of the area included in the fourth division, but inasmuch as some of them lived perhaps 150 miles or more distant, it was undoubtedly necessary that the drawing occur in June if they were to be notified in time to appear when needed.

On August 4, 1909, plaintiff in error asked that his witnesses be summoned at the expense of the Government, and the order was accordingly entered. (R., 6, 7.)

On September 7, 1909, the cause came on regularly for trial at the July term, and counsel for both parties having announced their readiness for trial, the first juror was called and sworn on his *voir dire*, whereupon counsel for the plaintiff in error "simply for the purpose of preserving the record" objected to the selection of a jury from that panel on the ground that it was called without authority of law. (R., 11, 12.)

This objection being overruled, an exception was taken, but no further objection was made when the jurors had all been selected and were sworn to try the cause. (R., 106.)

Assuming that the exception is sufficient to raise the question of the validity of the trial jury, the objection is without merit.

Clearly, plaintiff in error suffered no actual prejudice in the selection of the trial jury. It is contended, however, that a substantial right of his was thereby violated, in that the jury had no power to try the case. (Brief, 5.) In support of this contention, plaintiff relies on section 110, Tit. II, of the act of March 3, 1899, which provides—

> That an issue of law must be tried by the court, and an issue of fact by jury, of the political division in which the action is triable. (30 Stat., 1296.)[1]

It is argued that "the action in this case was triable in the fourth division; the jury was not drawn in and was not 'a jury of the political division,' to wit, the fourth division, but of the old third division." (Brief, 6, 7.)

The implication seems to be that section 110 requires the drawing of a trial jury exclusively from the division in which the action is tried. As we have indicated, this supposed requirement was probably fulfilled in the present case; nor is anything to the contrary alleged or shown. But aside from this, to give to section 110 the effect suggested is to ignore its context and the provisions of the same act which deal with the formation of the trial jury. The section is included in chapter 12 of the Alaska Code of Criminal Procedure, which chapter, under the title "Of Issues of Law and Fact," defines such issues and declares how they

[1] This section is misquoted, no doubt inadvertently, in the brief of plaintiff in error (22).

are to be tried. It contains no reference to the manner of selecting a jury or the qualifications of jurors. (30 Stat., 1296.) That topic is covered by chapter 14 following, "Of the Formation of the Trial Jury." Section 119 of that chapter (30 Stat., 1297) provides that trial jurors shall be selected and summoned in the manner prescribed by the laws of the United States with respect to jurors of the district and circuit courts, and shall have the qualifications provided in chapter 4, Tit. II, of the act in the case of grand jurors, one of these qualifications being that the juror shall be a male inhabitant of the district. (30 Stat., 1286.)

The laws of the United States referred to include section 802 of the Revised Statutes, which provides in part that jurors shall be summoned from such parts of the district as the court shall direct.

In view of these provisions and of the fact, as already stated, that the jurisdiction of each division of the court in Alaska extends over the entire district, Congress can hardly be said to have confined the selection of jurors to the particular division in which the trial is held. See—

Clement v. *U. S.* (C. C. A., 8th C.), 149 Fed., 305.

Spencer v. *U. S.* (C. C. A., 8th C.), 169 Fed., 562.

The contention, then, is reduced to the bald proposition that the trial jury was not a jury of the fourth division because called by the court sitting in the third division.

The conclusion does not follow from the premise. The act of 1909 did not create a new court in Alaska. The purpose of an act of Congress erecting a new division in an existing circuit court is, presumably, to advance the convenience of litigants (*Rosencrans* v. *U. S.*, 165 U. S. 257, 262); and its effect, in the absence of express provision to the contrary, is simply to establish another place at which court is to be held. This principle is well expressed in *Rosencrans* v. *U. S.*, *supra*, at 260:

> These statutes declare the general rule, that jurisdiction is coextensive with district. That being the general rule, no mere multiplication of places at which courts are to be held or mere creation of divisions nullifies it. Indeed, the place of trial has no necessary connection with the matter of territorial jurisdiction.

The provision as to the jurisdiction of each division is also inconsistent with the notion that the erection of the new division created a new court.

Even if the act of 1909 had that effect, the result urged by plaintiff in error would not necessarily follow. It might well be held that the new court succeeded to the old (which had included within its boundaries practically all the territory contained in the new division) so as to take over the jury called by the latter. (See *Bird* v. *U. S.*, 187 U. S., 118.) But if, as we contend, that act merely appointed a new place for the holding of court, no reason is seen why the District Court sitting in the old third division should not summon jurors for the trial of causes in

the new fourth division upon its inception. It is inconceivable that Congress intended any such break in the continuity of the administration of justice in Alaska. As was said in *Bird* v. *U. S., supra*—

> There is a presumption against a construction which would render a statute ineffective or inefficient or which would cause grave public injury or even inconvenience.

The case of *United States* v. *Beasly* (2 Alas., 93), cited on this head by plaintiff in error, merely decided that a grand jury sitting in a particular division of the district of Alaska can not find an indictment for a crime committed in another division of that district. The decision seems squarely opposed to *Logan* v. *U. S.*, 144 U. S., 263, 297, and *Rosencrans* v. *United States, supra.* Whether or not it be regarded as law for Alaska, however, it obviously has no bearing on the point now under discussion.

It is an accepted doctrine of this court that a mere irregularity in the selection of a jury will not justify reversal unless prejudice is shown. (*Agnew* v. *U. S.*, 165 U. S., 36.) No attempt is made to show actual prejudice in the present case; the objection to the panel is purely technical. Under such circumstances, objections of this sort are not to be favored. (*Breese* v. *U. S.*, 226 U. S., 1, 11.) Unless, therefore, this court discovers in the proceedings complained of a jurisdictional defect which would render null and void the summoning of the panel and all proceedings

consequent thereon (*Clinton* v. *Englebrecht*, 13 Wall., 434, 441; cf. *Powers* v. *U. S.*, 223 U. S., 303), it will not reverse on this ground. We submit that no such defect appears in the proceedings below. The reasoning of plaintiff in error comes to this: that the trial jury was invalid because when drawn Fairbanks was in the third division, but when sworn the name of the division had been changed to the fourth. So stated, the argument answers itself.

CONCLUSION.

The plaintiff in error received a fair and impartial trial at the hands of the trial court, the rulings on the evidence and instructions were correct, and the petit jury was lawful. The judgment below should therefore be affirmed.

JESSE C. ADKINS,
Assistant Attorney General.
KARL W. KIRCHWEY,
Assistant Attorney.

JANUARY, 1913.

○

MATHESON *v.* UNITED STATES.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE FOURTH DIVISION OF THE TERRITORY OF ALASKA.

No. 148. Submitted January 24, 1913.—Decided February 24, 1913.

Where the jurisdiction is coextensive with the district, multiplication of places at which courts may be held or mere creation of divisions does not nullify it. *Barrett* v. *United States*, 169 U. S. 231.

Jurors summoned by the District Judge in Alaska before the act of March 3, 1909, creating a Fourth Division, became effective, to attend the first term of the court in that division when the act did become effective, *held* properly summoned, as the act did not create a new tribunal or revoke the power of the District Judges to summon jurors to attend at any session of the court.

It is the duty of the judge to determine whether non-experts are qualified to express an opinion as to sanity of the accused, and in this case there does not appear to have been any abuse of discretion.

An instruction that while the burden of proof is on defendant to establish the fact of insanity, the jury cannot convict if they had reasonable doubt as to his sanity, held proper and sufficient. *Davis* v. *United States*, 160 U. S. 469.

The court properly instructed the jury as to the definition of insanity and as to what relieves defendant from criminal responsibility by giving the charge approved in *Davis* v. *United States*, 165 U. S. 373.

THE facts, which involve the construction of certain provisions of the Alaska Code of 1900 and the validity of a trial and conviction for murder in Alaska, are stated in the opinion.

Mr. James Wickersham and *Mr. John F. Dillon* for plaintiff in error.

Mr. Assistant Attorney General Adkins and *Mr. Karl W. Kirchwey* for the United States.

MR. JUSTICE LAMAR delivered the opinion of the court.

Congress, by the act of June 6, 1900 (31 Stat. 321, 322, c. 786), established a District Court for Alaska with general civil and criminal jurisdiction. There were three judges, who though given jurisdiction over the entire District were required to reside in that one of the three Divisions to which they were respectively assigned by the President. On December 29, 1908, the Grand Jury of the Third Division indicted Matheson for murder. On the next day he was arraigned and entered a plea of not guilty. Before his case was called for trial, Congress passed the act of March 3, 1909 (35 Stat. 838, 839, c. 269), providing for a Fourth Division to be held at Fairbanks by the judge of the former Third Division. This act was not to become effective until July 1, 1909, but in preparation for the first term convened thereunder the District Judge, assigned to the Fourth Division, passed an order, under which jurors were drawn and summoned in June to attend at the session of court to be held in July at Fairbanks.

On July 13, during this term, the defendant applied for and obtained an order to have his witnesses subpœnaed at the expense of the Government. His case was called for trial in September. He announced ready, and without making any question as to the qualification of the jurors or the method and regularity of their selection, objected to the entire panel on the ground that the Judge of the Third Division was without jurisdiction to issue the call at a time when the Fourth Division had not come into existence. The objection was overruled. Several of those on the jury, which tried his case, were taken from this panel. After a verdict of guilty and sentence to imprisonment for life the case was brought here by writ of

error in which complaint is made of the action of the Judge in allowing a jury to be selected from a panel drawn in June, before the act creating the Fourth Division became effective.

The Alaskan Code (June 6, 1900, 31 Stat. 321, 322, §§ 4 and 5, c. 786), created one District Court with three judges having general civil and criminal jurisdiction over the entire District, and authority to hold regular terms at Juneau, St. Michæl's and Eagle City and Special terms at such times and places in the District as they or any of them might deem expedient. The act of March 3, 1909 (35 Stat. 838, 839, c. 269), in providing for a Fourth Division did not contemplate an interruption of the functions of the Judge throughout the entire District, nor did it destroy the unity of the District Court. But while preserving unimpaired the power of the court and judges, it fixed a new place, at which the same District Court must be held. It did not create a new tribunal, with new officers, to be organized in a new political division, but it continued the jurisdiction and power of the Judge to be exercised anywhere in Alaska. It did not revoke his authority to summon jurors to attend at any session of the District Court, whether permitted to be held at Fairbanks under the act of 1900, or required there to be held after July 1, under the act of 1909. The principle involved is, in some of its aspects, like that considered in *Rosencrans* v. *United States*, 165 U. S. 257, where it was said that "jurisdiction is co-extensive with District and no mere multiplication of places at which courts are to be held or mere creation of division nullifies it." *Barrett* v. *United States*, 169 U. S. 231, 299; *Bird* v. *United States*, 187 U. S. 118. There was no error in overruling the objection made by the defendant to the panel.

There are 37 assignments of error, none of which presents a ground requiring a reversal. One relates to the giving of a charge requested by the defendant; others to

rulings as to which no exception was taken at the time or as to matters not set out in the assignments and requiring a search through the record to determine the subject of the complaint; others to the exclusion of testimony as to facts subsequently proved.

Those which relate to the refusal of the court to permit non-experts to express the opinion that the defendant was insane, until after they had given facts on which it was based, are without merit. It was the duty of the judge to determine whether such witnesses had qualified themselves to give opinion evidence, and there was no abuse of the court's discretion in passing on these matters (*Turner* v. *American Security & Trust Co.*, 213 U. S. 257, 260), but his rulings were favorable to the defendant.

It would serve no useful purpose to discuss the ruling as to the burden of proof and the definitions of insanity, since they present no new propositions. In both these matters the court followed cases in which those subjects have been fully treated. He instructed the jury that while the burden of proof was upon the defendant to establish the fact that he was insane at the time of the killing, yet they could not convict if they had a reasonable doubt as to his sanity. *Davis* v. *United States*, 160 U. S. 469. His definition of insanity and as to what would relieve the defendant of criminal responsibility was in accord with the principle declared in *Davis* v. *United States*, 165 U. S. 373, 378—in fact, the court gave the exact charge there held to be correct. The case was one peculiarly for the jury, and finding no error in matter of law, the judgment must be

Affirmed.